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No. 88-——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CITY OF RIVERTON, WYOMING, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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September 21, 1988

QUESTIONS PRESENTED

The questions presented are:

1. When Congress has directed that water rights for the Reservation be obtained under state law, does this Court's decision in *United States v. New Mexico* prohibit the implication of a Federal reserved water right which will significantly diminish the previously-awarded state water rights of non-Indian water users?

2. May land be classified as practicably irrigable when it is identified for inclusion in future irrigation projects which are economically infeasible under the discount rate required by law for application to Federally-funded water projects?

3. May a non-Indian successor to an individual indian's allotment within the Reservation maintain the portion of the Reservation's reserved water right attributed to his allotment without a showing of continuous beneficial use of the water right since the time of acquisition?

4. Is the United States estopped from claiming a Federal reserved water right to the severe detriment of water rights of non-Indians when the United States' induced non-Indian settlement with a promise of non-Indian access to water under state law and required that water rights for the Reservation also be obtained under state law?

LIST OF PARTIES

The parties to the proceedings below are as set forth in the State of Wyoming's Petition for Writ of Certiorari dated August 19, 1988 ("Wyoming Petition"), at ii.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

The cross-petitioners[1] respectfully request that a writ of certiorari issue to review the judgment of the Wyoming Supreme Court entered on February 24, 1988.

OPINIONS BELOW

The opinions below are referenced in the Wyoming Petition, at 1. They are accurately reproduced at Wyoming Petition Appendices A through I upon which these cross-petitioners rely.

JURISDICTION

The decision of the Wyoming Supreme Court was rendered on February 24, 1988, affirming in part and reversing in part the amended judgment and decree of the state district court, and remanding the matter for further proceedings consistent with the opinion. The Wyo-

[1] This cross-petition is filed by the following parties below:

Represented by Donald P. White: City of Riverton, Wyoming; Riverton Valley Irrigation District and Midvale Irrigation District.

Represented by C. Edward Webster, II: Owl Creek Irrigation District.

Represented by Ruth Clare Yonkee: Red Lane Improvement District; Town of East Thermopolis, Wyoming; Black Butte Livestock Company, Campbell's Incorporated; and the following individual appellants: Kenneth Ward Crandall, Phyllis L. Crandall, Barbara J. Daniels, Billy M. Daniels, Carl Dockery, Carol Dockery, Clyde R. Fisher, Gloria A. Fisher, Charles Goldben, Ogla J. Harvey, Robert W. Harvey, Brenda Joyce Kellogg, Gary V. Kellogg, William A. Matthews, Arthur D. McCumber, Marvin W. Meyer, Ernestine S. Meyer, C. Duane Rush, Kathryn C. Rush, Brian F. Sanford, Kathleen Sanford, Norman L. Sanford, Barbara Smith, Robert Stewart, Delores J. Weese, Raymond C. Weese, Ruth Clare Yonkee, *pro se*.

Counsel for cross-petitioners received the Wyoming Petition as follows: Mr. White, August 22, 1988; Mr. Webster, August 23, 1988; Ms. Yonkee, August 23, 1988. In compliance with Rule 19.5 of this Court, this cross-petition is filed within 30 days of August 22, 1988.

ming Supreme Court denied timely petitions for rehearing on April 22, 1988. This Court's Order Extending Time to File Petition for Writ of Certiorari to August 20, 1988, was entered in A-14 on July 7, 1988. The jurisdiction of this Court to review the judgment of the Wyoming Supreme Court is invoked under 28 U.S.C. § 1257 (3). The finality of the Wyoming Supreme Court's judgment was described by the Wyoming Petition in the Statement of the Case, at note 7, and the accompanying text. This Cross-Petition is filed pursuant to Rule 19.5 of the rules of this Court.

TREATY, STATUTES AND ORDERS INVOLVED

The treaty, statutes, and orders involved in this case are fully set forth in the Wyoming Petition, at 2-3.

STATEMENT OF THE CASE

The cross-petitioners adopt and endorse the Statement of the Case contained in the Wyoming Petition. It is supplemented here only as is pertinent to the issues raised by these cross-petitioners.

Description of the Cross-Petitioning Parties

The parties to this cross-petition are identified in footnote 1, above. Each of these parties is a water user under authority of Wyoming law within Wyoming Water Division No. 3, which is coterminous with the Big Horn River Basin. For example, the Midvale Irrigation District encompasses approximately 73,000 acres of irrigated land operated by approximately 650 irrigators within the federally funded Riverton Reclamation Project, which itself is entirely within the ceded portion of the Wind River Indian Reservation ("Reservation").

The individual cross-petitioners are farmers and ranchers owning lands in the Big Horn River Basin. Some of these individuals are also members of Riverton Valley Irrigation District, Owl Creek Irrigation District, or other corporate cross-petitioners.

Not all incorporated parties are irrigators. The City of Riverton, Wyoming, for example, is an incorporated municipality located within the Reservation at the point at which the Wind River and the Popo Agie River flow together to form the Big Horn River. *See* Wyoming Petition, Exhibit A. Riverton supplies its approximately 10,000 inhabitants with water relying upon water rights obtained under Wyoming law.

History of Irrigation Development in the Big Horn Basin

The Big Horn Basin bears a long and proud history of irrigation development testifying to the hardiness of the pioneers who came to the basin to participate in the development of the dry western reaches of the United States.

The first settlers came to what was later to become the State of Wyoming in the early 1800's. Wyo. Ex. WRIR PW-2. By the 1860's, a sufficient number of settlers had come to the area to merit the establishment of a reservation for the Shoshone Tribe of Indians and, by 1868, the exterior boundaries of the Reservation were quite similar to those existing today. Wyo. Ex. WRIR PW-2, pp. 162-165.

Development of lands within the the Big Horn Basin was induced by various land disposal acts passed by Congress between 1820 and 1930, which resulted from Congress' recognition that settlement and subsequent development of the vast western public lands would not proceed unless legislation were passed favoring that settlement. Wyo. Ex. WRIR MV-11; Tr. 10510. Within the Big Horn Basin, public lands were disposed of under the Cash Entry Act, the State Selection Act, the Homestead Act, the Stock Raising Homestead Act, the Mining Act, the Desert Land Act, the Carey Act and the Reclamation Act.[2] Because water rights did not accompany a land

[2] *See* Wyoming Petition App. F, at 259a-260a, Findings of Fact, 106-111; Wyoming Petition App. H, at 688a-689a, Findings of Fact I.3. through I.6.

patent established under any of the disposition acts, it was the responsibility of the settlers seeking patents under the disposition acts to initiate their own water rights under state law.[3] In the case of several of these acts, no patent would be granted until water rights were obtained[4]

By the mid-1880's, settlement of the basin was proceeding apace and small communities had been established. Wyo. Ex. WRIR SF-1, Appendix B; Defendant's Ex. Deaver-Wilkwood-Elk No. 13, at 1. Accompanying development of the new communities was settlement of the surrounding lands by farmers and ranchers. As typically happened throughout the west, the earliest settlers obtained the most easily irrigable lands. Wyo. Ex. PW-2, at 224-242; Wyo. Ex. SF-1, Appendix B at 8. Later settlers moved into the interior valleys of the basin, necessitating the construction of large irrigation projects to supply water to the newly-settled lands. *Id.* As early as 1904, President Theodore Roosevelt authorized construction of the Shoshone Reclamation Project, an effort spanning over 50 years and ultimately resulting in the development of over 90,000 acres of irrigated lands in the basin. Defendant's Ex. Deaver-Wilkwood-Elk No. 13, at 1. In 1905, the Governor of Wyoming initiated a survey of lands within the Wind River Basin which were formerly a part of the Reservation but which were ceded to the United States by the Act of March 3, 1905, 33 Stat. 1016 ("1905 Act"). Wyo. Ex. WRIR PW-2, at 226. The survey set out approximately 335,000 acres of land as

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[3] It is established by the decisions of this court that settlers on the public lands under the various disposition acts acquired no water rights, but that Congress intended to make available waters on the public lands for appropriation under the laws of the states and territories of the western United States. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

[4] *See* 1891 Amendment to Desert Lands Act, March 3, 1891, 26 Stat. 1096, § 5, Wyo. Ex. WRIR DS-13; Carey Act of 1894, 28 Stat. 422, at 422-423, § 4, Wyo. Ex. WRIR DS-17; Reclamation Act of 1902, 32 Stat. 388, at 389, § 5, Wyo. Ex. WRIR DS-21.

potentially irrigable and secured all of the remaining water rights for the Wind River drainage, essentially determining the boundaries for what would later become the Riverton Irrigation Project. *Id.*

As a consequence of these efforts, and thousands like them, present non-Indian irrigation within Water Division 3, Wyoming, all of which proceeds under water rights obtained under Wyoming law, comprises approximately 550,000 acres, of which 120,000 acres are within the exterior boundaries of the Reservation. No non-Indian water right has a priority earlier than the 1868 priority awarded by the Wyoming Supreme Court for the reserved water right in this case.

Acquisition of Reservation Water Rights Under the 1905 Act

At the same time as non-Indian settlers in the Big Horn Basin were acquiring water rights under Wyoming law, so too was the United States on behalf of the Reservation. The 1905 Act and the acquisition of state water rights for the Reservation were discussed in detail in the Wyoming Petition, at 5-6 and 12-18. For purposes of this cross-petition, it is sufficient to note that, under the Water Proviso of the 1905 Act, Article III, Congress required that water rights for the Reservation be obtained in accordance with Wyoming law. Responding to Congress' direction, the United States obtained permits to irrigate 145,000 acres of Reservation lands. While, due to the inaction of the United States in maintaining those permits since 1963, only 87,000 acres remain under valid permits today, those which have expired may be reinstated upon application of the United States to the Wyoming State Engineer. Prior to the announcement of *Winters v. United States*, 207 U.S. 563 (1908), no assertion was made that the water rights of the Reservation could be secured other than by reliance upon Wyoming law and it was not until after this Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), that the Indian Service neglected to extend the permits obtained under the 1905 Act.

Quantification of the Reserved Right

In spite of the 1905 Act's express deference to Wyoming law, the Wyoming Supreme Court quantified a Federal reserved water right with an 1868 priority on behalf of the Reservation for some 500,000 acre-feet of water for use upon approximately 100,000 acres of land held in trust or by individual Indians within the current boundaries of the Reservation. Wyoming Petition, at 8-10. Of this amount, 290,490 acre-feet were for 54,221 acres of land found to have been historically irrigated, while 209,930 acre-feet were for 48,520 acres of future projects. Wyoming Petition, at notes 26 and 27, and accompanying text.[5]

Effect of the Decision Below Upon State-Awarded Water Rights

The adverse effect of quantification of the Reservation's reserved water right was well documented below. The master devoted 12 findings of fact specifically to the effect of quantification of an 1868 Federal reserved water right upon pre-existing state-awarded water rights.[6] In

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[5] The reserved water right awarded is disporportionate to the Basin's Indian population and to the Indians' historic water use on the Reservation. At the time of trial, the tribal enrollment on the Reservation was approximately 5,200, Tr. 407, while the non-Indian population of the Basin was over 100,000. Yet, while the Indian population is less than 5% of the Basin's total, the reserved right was quantified to serve approximately 15% of the Basin's total irrigated acreage. Furthermore, the total reserved water right awarded was nearly double the historic use attributed to the Indians below after over 100 years of irrigation development on the Reservation. Since the total historic acreage includes much land shown to have been irrigated for one season only—and which was not shown still to be irrigated at the time of trial—the disproportion is in reality more than double.

[6] Wyoming Petition App. H. at 688a-690a. *See also id.* at 629a-630a. Among his findings, the master included that Congress intended and approved the appropriation system for Wyoming but that "today owners of water rights in Division 3 may suffer damages from an inability to put their rights to full use following the emplacement of an 1868 priority date for the Indians in the upper

order to soften the effect of the reserved right,[7] the master limited development of the future projects' portion of the reserved water right to no more than 10% of the total reserved right in each decade following the decree, unless storage facilities were in place to provide all water necessary for Indian and non-Indian users. Wyoming Petition App. H. at 584a, 626a-627a.

The district court originally agreed with the master's conclusion that state-awarded water right users would be damaged by the reserved water right and so found. Wyoming Petition App. F, at 258a, Finding of Fact 98. On this basis, the district court ruled that upstream storage would be required to be in place to provide water for the additional acreage of each of the five future projects before *any* construction of the project could begin. Wyoming Petition App. F, at 236. Finding of fact 98 and the storage requirement were, however, deleted by a subsequently-assigned different district judge who heard no additional evidence on the injury question.[8]

A closely divided Wyoming Supreme Court (3-2) rejected the storage limitation developed by the master and the district court. Wyoming Petition App. A, at 71a. The court opined that the storage requirement was inconsistent with the object of the reserved water right which it described as a prior entitlement to the waters

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reaches of the Wind River." Wyoming Petition App. H. at 688a, Finding of Fact I.2.

[7] The master, while recognizing the injustice of his decision upon non-Indian users, seemed to believe himself powerless to limit quantification of the reserved right due to injury to state-awarded water rights. The master thought that doing so would "be the imposition of a second wrong to atone for the first." Wyoming Petition App. H, at 626a.

[8] This case was begun in January, 1977, in the Big Horn Basin. At that time, District Judge Joffe was assigned the case and appointed Master Roncalio. Judge Joffe presided over the case until retiring shortly after issuing his opinion. District Judge Johnson was subsequently assigned the case and heard only the various post-trial, pre-appeal motions of the parties.

of the Reservation. *Id.* The dissent, however, would have gone beyond the protection offered by the storage requirement and denied the Federal reserved water right for the claimed future projects. Wyoming Petition App. A, at 84a.

In spite of the fact that the future projects remain unbuilt, recent pertinent developments demonstrate that the damage to state-awarded water rights predicted by the master and the district court has already begun to be felt. The Bureau of Indian Affairs ("BIA") has ordered that, as between Indian and non-Indian water users on the same irrigation project within the Reservation, the demands of the 1868 Indian reserved right are to be met first before any water will be distributed to junior non-Indian water rights on the project. The perhaps inevitable conflict ensuing from this decision has resulted in litigation, as a part of this adjudication, by non-Indian users on the irrigation project to foreclose the BIA's actions.[9]

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[9] The conflict has arisen in what is known as the Crowheart Area of the Reservation and, more specifically, in that area south of the Wind River within the diminished reservation. The water in question is delivered through the Wind River Irrigation Project, a Federal irrigation project serving Indians and non-Indians. On August 2, 1988, the superintendent of the Wind River Agency, having control of the operation of the Wind River Irrigation Project, issued his guideline that the demands of the 1868 reserved water right would be met before any water would be delivered to junior non-Indian rights of the project. *See* Cross-Petitioners' App. A. A few weeks earlier, however, the policy had already been placed into action when non-Indian users on the project, who are successors to Indian allottees, were informed by BIA officials that demands of Indian users would be satisfied first. Cross-Petitioners' App. B, at 2a, 7a, 9a. These non-Indian water users on the Reservation filed a petition in civil action no. 4993, which is this general adjudication below, for a temporary restraining order against the actions of the BIA. Cross-Petitioners' App. B, at 2a, *et seq.* The petition was denied. It should be noted that the non-Indian users on the Wind River Project, and the other Federal irrigation projects within the Reservation, though they now suffer from the junior status, are financially responsible for at least, if not more than, their *pro rata*

REASONS FOR GRANTING THE WRIT

The State of Wyoming has already brought to this Court's attention three important reasons for which its petition should be granted. These cross-petitioners fully support the Wyoming Petition and would demonstrate four additional bases [10] upon which the Wyoming Supreme Court's decision ignores or misapplies the decisions of this Court, is in conflict with the decisions of the circuit courts of appeal, or fails to consider acts of Congress pertinent to the quantification of the reserved water right

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portion of annual operation and maintenance of the Project. It should also be noted that the Federal irrigation projects were built under permits obtained from the State of Wyoming under the 1905 Act, in conformity with state law, and that prior to 1988, Indian and non-Indian users were treated as having equal priority on the projects.

[10] Following the filing of claims by the United States and Tribes, the State of Wyoming and the cross-petitioners asserted: (1) that the quantification of a Federal reserved water right which will significantly diminish the previously-awarded water rights of non-Indian water users is prohibited when Congress has directed that water rights for the Reservation be obtained under state law (Question 1, herein) Wyoming Petition, App. H, at pp. 404a, ¶ 2, 402a, ¶ 1, 431a, 436a-7a; (2) that land may not be classified as practicably irrigable when it is identified for inclusion in future irrigation projects which are economically infeasible under the discount rate required by law for application to Federally-funded water projects (Question 2, herein) Wyoming Petition, App. H, at pp. 404a, ¶ 3, 405a, 545a, 575a; and (3) that a non-Indian successor to an individual Indian's allotment within the Reservation may not maintain a portion of the reserved water right attributed to his allotment without a showing of continuous beneficial use of the water right since the time of acquisition (Question 3, herein), Wyoming Petition, App. H, at pp. 406a, ¶ 10, 420a, *et seq.*, *see also* Brief of Appellee State of Wyoming (type 3 claims), pp. 29 *et seq.*; (4) that the United States is estopped from claiming a Federal reserved water right for the Reservation, to the detriment of the water rights of non-Indians when the United States' induced non-Indian settlement of the Big Horn Basin, with a promise of access to water under state law for all beneficial purposes, and required that water rights for the Reservation be obtained under state law (Question 4, herein) Wyoming Petition, App. H, at pp. 623a *et seq.*, *see also* Wyoming Petition, App. A, at pp. 22a and 23a.

on the Reservation. Because of the importance of these questions in the adjudication of Federal reserved water rights throughout the western states, this Court should grant certiorari on these issues to clarify the application of the Federal reserved water right doctrine and to provide the protection to which state and private water right users are entitled under the decisions and laws of the United States.

It should be noted that the reasons described by this cross-petition generally address limitations upon the reserved water right awarded below. These cross-petitioners, however, wish to make it clear that their presentation of these reasons does not diminish their support for Wyoming's contention that Congress expressly intended that water rights for the Reservation be obtained under the laws of Wyoming.

I. Because The Federal Reserved Water Right For The Reservation Will Significantly Diminish Previously-Awarded State Water Rights Of Non-Indian Users And Because Congress Has Directed That Water Rights For The Reservation Be Obtained Under State Law, The Wyoming Supreme Court's Failure To Circumscribe The Effect Of Its Quantification Upon Non-Indian Users Is In Conflict With This Court's Decision In *United States v. New Mexico.*

By the 1905 Act, Congress directed that water rights for the Reservation be obtained in strict accordance with Wyoming law. Permits to irrigate 145,000 acres of Reservation lands were thereafter acquired. Acting in disregard of this historical precedent, the Wyoming Supreme Court quantified a vast reserved water right which replaced those Wyoming water rights acquired under the 1905 Act and which will, as a result, severely damage the water rights of these cross-petitioners and others similarly situated. In so doing, the Wyoming Supreme Court ignored this Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), which instructs that the quantification of a Federal reserved water right must be

sensitive not only to Congress' policy of deference to state water law, but also to the rights of state and private water users who are the victims of the quantification. This Court should accept certiorari to apply its decision in *United States v. New Mexico*, and thereby to protect state and private water users in the Big Horn Basin from a gallon for gallon reduction in their water rights, and to rescue the 1905 Act from the dustbin of history.

In *New Mexico*, this Court insured that the implication of a Federal reserved water right would not destroy the hard-won water rights of water-needy state and private appropriators. Reaffirming and relying upon its previous decisions,[11] this Court demanded a careful examination

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[11] These cross-petitioners believe that *New Mexico* is properly read as one in a series of cases by which this Court, while reaffirming Congress' power to imply a reserved water right, has sought more carefully to restrict a reserved right doctrine which was threatening to destroy state sovereignty over water rights. Initially, this Court made it clear that, under ordinary circumstances, the state courts have jurisdiction to adjudicate both Indian and non-Indian reserved water rights. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); *United States v. District Court In and For the County of Eagle*, 401 U.S. 520 (1971). In *Cappaert v. United States*, 426 U.S. 128, this Court addressed the substance of the reserved water right doctrine and made it clear that quantification of a reserved water right would be restricted to the United States' minimum needs. *Cappaert* was closely followed by *United States v. New Mexico*, which reapplied the *Cappaert* minimal needs test, and, recognizing that even under those circumstances a gallon-for-gallon reduction in the amount of water available for state and private appropriators might result from the quantification of a reserved right, held that any such reduction would be weighed in determining what, if any, water had been reserved. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), a fishing rights case, affirmed that Indian reserved rights must not monopolize a natural resource, but be sufficient only to provide the Indians with a moderate living. Finally, in *Arizona v. California*, 460 U.S. 605 (1983), this Court questioned whether the expansive quantification of Indian reserved water rights based upon practicably irrigable acreage would automatically be applied for all Indian reservations.

of the need and purpose of a claimed Federal reserved water right. *New Mexico*, 438 U.S. at 700. This examination is required both because a reserved right is normally created by implication and because of the history of congressional deference to state law in the field of federal-state jurisdiction respecting the allocation of water.[12] *Id.* at 701-702. Relying upon these stark realities, and acknowledging that the quantification of Federal reserved water rights can wreak havoc upon long-established state economies dependent upon state-awarded water rights, this Court stated that the damage resulting to state-awarded water rights "must be weighed in determining what, if any, water Congress reserved for use" on behalf of a reservation. *New Mexico*, 438 U.S. at 705.

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[12] That the reserved right doctrine should be applied sensitively to the needs of state and private appropriators had, with remarkable foresight, been recommended to Congress by Porter J. Preston and C. A. Engle, engineers for Bureau of Reclamation and Bureau of Indian Affairs, respectively, in their report of June 8, 1928. Preston and Engle, *Report of Advisers on Irrigation on Indian Reservations*, June 8, 1928, *reprinted in Survey of Conditions of the Indians in the United States, Hearings Before a Subcommittee on the Committee on Indian Affairs*, United States Senate, 71st Cong., 2d Sess., Part 6, 11/21/30. Among the recommendations in the lengthy report, Messrs. Preston and Engle suggested that the laws of the states in which Indian reservations are situated be complied with in the acquisition and protection of water rights if doing so could be accomplished without jeopardizing the rights of the Indians. *Id.* at 2213. Messrs. Preston and Engle, like this Court in *New Mexico*, recognized the force of the *Winters* decision, but recommended to Congress "that in all cases where the application of this principle would result in the loss of water rights regularly acquired by appropriation and beneficial use, and in consequence considered valid under state laws, the Government should provide an adequate water supply for the Indians in question, either by purchase of valid rights, or the construction of storage reservoirs, or the impounding of flood or surplus waters, such purchase of rights or storage reservoir construction to be paid for out of gratuity appropriations. Any other course, in our opinion, would be penalizing the rights of private citizens for the failure of the Government to properly protect the Indian and his water rights." *Id.*

This aspect of the decision in *New Mexico* came to be called the "sensitivity doctrine" below.[13]

The circumstances of this case fall squarely within *New Mexico*. The 1905 Act is a classical example of Congress' express deference to state law respecting the allocation of water.[14] The mandate of the Act was obeyed by the Indian Service (now the BIA) which acquired Wyoming water rights for the Indians to irrigate 145,000 acres of the Reservation, or approximately 44,000 acres more than were classified as practicably irrigable below. During the same era, in part to comply with the land disposition laws of the United States, the non-Indian predecessors of these cross-petitioners also asquired water rights under Wyoming law, many to irrigate lands of the Reservation opened to them under the same 1905 Act. Both the master and the initial decision of the district court found that the reserved water right would severely

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[13] The term "sensitivity doctrine" arises from Justice Powell's partial dissent in *New Mexico*. Justice Powell, and the Justices joining with him, agreed with the majority that "the implied-reservation doctrine should be applied with sensitivity to its impact upon those who obtain water rights under state law and to Congress' general policy of deference to state water law." *United States v. New Mexico*, 438 U.S. at 718. Indeed, all nine Justices agreed that the effect of the quantification of a reserved water right upon state water users should be weighed with deference to the extent of the impact and to Congress' general policy of deference to state water law.

[14] The 1905 Act was in part a response to concerns that water rights of the Reservation were insufficiently protected. That concern was expressed by the Indians themselves in the negotiations leading to the April 21, 1904, agreement which the 1905 Act confirmed. Wyo. Ex. WRIR I&P 8, at 19. It had been expressed even earlier with extreme urgency by officials charged with administration of the Reservation who demanded immediate action to secure the water rights of the Reservation under Wyoming law. *See* Wyo. Ex. WRIR I&P 42-47, 49-50, 52, Congress' response in the 1905 Act, consistent with the concerns previously expressed, was to provide for securing the Reservation water rights under Wyoming law and to dedicate a portion of the proceeds from sale of the ceded lands of the Reservation to that task.

damage those non-Indian water rights. Although each struggled with *New Mexico*'s proper application [15] within this historical setting, both the master and initial district court decision, guided by the sensitivity doctrine, required that the Tribes' implementation of the reserved water right for the future projects be preceded by construction of storage to prevent injury to non-Indian users [16] from the future projects.[17]

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[15] Though *New Mexico* was intended to restate the existing law of Federal reserved water rights there has resulted much consternation with respect to its proper application and scope. In *Colville Conferated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981), the Ninth Circuit Court of Appeals unhesitatingly applied the principles of *New Mexico* in quantifying a reserved water right for the Colville Reservation. Just two years later, in *United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983) *cert. denied sub nom. Oregon v. United States*, 467 U.S. 1252 (1984), the same court ruled that *New Mexico* was not directly applicable to *Winters* doctrine rights on Indian reservations, while nevertheless relying upon *New Mexico* as establishing guidelines for the quantification of Indian reserved rights. Disagreement as to *New Mexico*'s applicability also appears among the commentators. *See*, for example: Cohen, *Handbook of Federal Indian Law* (1982), 581-585; Schapiro, *An Argument for the Marketability of Indian Reserved Water Rights: Tapping the Untapped Reservoir*, 23 Idaho Law Review 277, 281; Isham, *Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit*, 43 Montana Law Review 247, 251-252; Shrago, *Emerging Indian Water Rights: An Analysis of Recent Judicial and Legislative Developments*, 26 Rocky Mountain Mineral Law Institute 1105, 1133-1143.

[16] Interestingly, protection of state water rights from the damaging effects of reserved water rights by the construction of storage had been recommended 52 years earlier. *See* Preston and Engle, at 2213, note 12, *supra*.

[17] The master accepted what he described as "a small, certain amount of evidence" of the effect of the claimed reserved right upon state and private users. Wyoming Petition App. H, at 630a. Based upon that evidence, the master ruled that the reserved right would inevitably damage the water rights of non-Indians. *Id.* at 629a and 688a through 690a, Finding of Fact I.12. The master therefore limited the Tribes' development of their future projects to no more than 10% of the total future project reserved right in each decade after the decree unless storage facilities were in place

The Wyoming Supreme Court, which merely assumed that *New Mexico* should apply in an Indian reserved water right case, refused to impose even the limited storage requirement crafted by the district court. Wyoming Petition App. A, at 70a-71a. In addition, despite the teachings of *New Mexico* and despite the master's and district court's findings regarding the disastrous effect of the reserved water right awarded below, the Wyoming Supreme Court did not even consider as factors in its quantification of the reserved right (1) Congresss' deference to state law in the 1905 Act, (2) the acquisition of sound and ample state water rights for the Tribes under the Act, (3) the replacement of those state water rights by an unnecessary reserved right bearing an 1868 priority date, or (4) the damaging gallon for gallon effect of that replacement upon non-Indian water users nearly 80 years after their predecessors watched the United States vigorously observe the 1905 Act. Instead, in utter disregard of the proof, the court claimed that no gallon for gallon reduction would occur if the storage requirement were eliminated [18] and incorrectly ruled that sufficient

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to provide all water necessary for the needs of Indian and non-Indian users. *Id.*, at 584a, 626a-627a. The district court initially agreed with the master's finding that state and private water users would be damaged by the reserved water right. Wyoming Petition App. F, at 258a, Finding of Fact 98. Based upon that finding, the district court prohibited construction of any Indian future project until such time as storage facilities were in place to provide all water needed by non-Indian users. Wyoming Petition App. F, at 235a-236a. Upon hearing of post-trial motions, however, the storage protection was eliminated, as was finding 98. Wyoming Petition App. D, at 169a and Wyoming Petition App. E, at 194a-199a. Elimination of finding 98 was remarkable in that no party had asked for its elimination, no party had presented evidence supporting its deletion upon rehearing, and its deletion was inconsistent with the unchallenged, and more extensive, findings of the master upon which the district court had originally relied to craft finding 98.

[18] Wyoming Petition App. A, at 71a. The magnitude of a reserved water right's harm is enhanced by the apparent flexibility of the water right. For example, though quantified for irrigation purposes, it appears that the Tribes' reserved right is subject to a

sensitivity to the needs of state and private water users had been shown by its narrow construction of the Reservation's purpose, its rejection of some 50,000 acres originally claimed as PIA, and its imposition of a higher water use efficiency than the United States and Tribes had originally proposed.

In the face of the evidence and applicable law, the Wyoming Supreme Court misapplied *New Mexico* in at least four fundamental ways. First, the Wyoming Supreme Court merely assumed the application of *New Mexico* to Indian reserved water right cases, even though this Court expressly relied upon both *Winters v. United States*, 207 U.S. 564 (1908) and *Arizona v. California*, 373 U.S. 546 (1963) in carefully circumscribing the standards by which reserved water rights would be quantified. *New Mexico*, 438 U.S. at 700, note 4, and the accompanying text.[19]

Second, despite *New Mexico*'s admonition that the reserved water right doctrine should be applied with sensitivity because of Congress' general policy of deference to state water law, the Wyoming Supreme Court gave no consideration to the effect of the 1905 Act upon the proper quantity of water to be reserved for the Reservation. The Wyoming Supreme Court never even addressed the issue of whether the water rights acquired under direction of the 1905 Act meet Reservation purposes with-

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variety of other uses to which the Tribes may elect to apply it. *Arizona v. California*, 439 U.S. 419 (1979). Should the Tribes be allowed to convert a portion of this irrigation water right to, for example, instream flows, its effect upon state-awarded water rights may be measurably increased. The Tribes have already notified the Wyoming State Engineer of their intent to do so. As described by the Wyoming Petition, the Tribes' plans may violate the primary/secondary purpose distinction of *New Mexico*, 438 U.S. at 702. Wyoming Petition, note 30 and accompanying text.

[19] Any doubt as to *New Mexico*'s applicability to Indian reserved water right cases should finally have been dispelled by this Court's reliance upon *New Mexico* in *Arizona v. California*, 460 U.S. 605, 621 (1983).

out the implication of the largely redundant reserved water right or whether the quantification of the reserved water right should be limited because of Congress' express deference to state water law on this Reservation. It is impossible to reconcile the Wyoming Supreme Court's inaction with this Court's direction that Congress' deference to state law must be weighed in the quantification of a reserved water right when such will result in a reduction of supplies to water-needy state and private appropriators.

Third, the Wyoming Supreme Court held that it had complied with *New Mexico* by narrowly drawing the Reservation purpose, by reducing the claimed PIA, and by imposing a water use efficiency requirement higher than had been originally claimed by the Tribes and the United States. In doing so, however, the court was merely affirming the findings of the district court on these independent legal and factual issues, each of which is unrelated to the sensitivity doctrine. As a result, the Wyoming Supreme Court's decision leaves the unfortunate implication that the sensitivity doctrine is intended as an excuse to modify the evidence or to alter a proper factual or legal conclusion in order to limit a reserved water right rather than as an equitable device to protect state water users *after* the facts and law have been correctly applied.

Fourth, the Wyoming courts misapplied *New Mexico* in offering protection to non-Indian water users only as against development of the future projects. As the Master below found, in a finding that remains undisturbed, "owners of water rights in Division 3 may suffer damages from an inability to put their rights to full use following the emplacement of an 1868 priority date for Indians in the upper reaches of the Wind River." [20] Hence, it is not only the construction of new projects which will damage state water users, but also the replacement, by the 1868

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[20] Wyoming Petition App. H, at 688a, Finding of Fact I.2.

reserved water right,[21] of congressionally-required and fully satisfactory state-awarded water rights obtained at the direction of the 1905 Act.

The Wyoming Supreme Court's misapplication of *New Mexico* is placed even more clearly into perspective by the decision in *Arizona v. California*, 460 U.S. 605 (1983), in which this Court refused to requantify existing Indian reserved water rights when doing so would disrupt the certainty of previously-settled state water rights and result in a gallon for gallon reduction in the amount of water available for state and private appropriators. *Arizona v. California*, 460 U.S. at 620-621 (1983). In the Big Horn Basin, by the 1905 Act and the land disposition acts, Congress created certainty and security for the water rights of Indians and non-Indians alike by requiring all water users to rely upon Wyoming law. Today, the Wyoming Supreme Court would displace the water rights of non-Indians by replacing and requantifying the Indians' Wyoming water rights with an 1868 reserved right. Yet the Wyoming Supreme Court could find no way to apply the protections developed by this Court in *New Mexico*.

This is a case in which the findings below demonstrate that there will be a gallon for gallon reduction in water available to state and private water users as a result of the quantification of a Federal reserved water right. It is a case in which Congress expressly deferred to state law to establish water rights for the Reservation. It is a case in which the certainty and reliability of vested water rights of state and private appropriators will be radically upset in order to enhance the Tribes' position by replacing sound Wyoming water rights for the Reservation with a larger, more senior and perpetual reserved water right. This Court should accept certiorari to clarify application of the sensitivity doctrine, to define its scope, and to correct the Wyoming Supreme Court's refusal properly to consider *New Mexico* in this case.

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[21] *See also*, note 9, *supra*.

II. The Wyoming Supreme Court Failed To Apply The Congressionally-Mandated Discount Rate In Determining The Federal Reserved Water Right For Future Irrigation Projects For The Reservation.

The Wyoming Supreme Court, like the lower courts, quantified the Reservation's reserved water right to serve the agricultural needs of the practicably irrigable acres ("PIA") of the Reservation. Its determination therefore required that it identify those lands on the Reservation susceptible to sustained irrigation at reasonable costs.[22] Roughly 48% of those lands have never been irrigated, but were included in future irrigation projects designed solely for this adjudication for the purpose of quantifying the reserved water right. *See* Wyoming Petition App. A, at 84a.

In determining the economic reasonableness of the future projects under the PIA test, the Wyoming Supreme Court was required to select and apply the proper long-term discount rate as one standard by which the economic feasibility of the projects would be measured. The Wyoming Supreme Court, as did the district court, applied a discount rate of 4%. Wyoming Petition App. A, at 54a. In so doing, however, the Wyoming Supreme Court ignored Congress' directive that the discount rate to be used for the formulation and evaluation of Federal water and related land resource projects, including these Indian future projects, was 7-1/8%. This Court should accept certiorari to apply the Congressionally-mandated discount rate ignored by the Wyoming courts.

Congress has ordered that the discount rate formula for the formulation and evaluation of Federal water projects shall be as annually set forth in the "Policies, Standards and Procedures in the Formulation, Evaluation and Review of Plans for Use and Development of Water and

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[22] Early in the litigation, Wyoming, the Tribes and the United States agreed upon the definition of practicably irrigable acreage to be applied in the case. PIA were "those acres susceptible to sustained irrigation at reasonable costs."

Related Land Use Resources." 42 U.S.C. § 1962d-17(a). Congress has assigned the responsibility for the determination of the proper discount rate to the Water Resources Council which publishes the discount rate annually in the Federal Register. For 1979, the year to which values relied upon herein were referenced, the Water Resources Council set the discount rate to be used in the formulation and evaluation of Federal water resources projects at 7-1/8%.[23]

At trial herein, both sides agreed that no future project proposed by the United States for the Reservation was feasible at the Congressionally-mandated discount rate of 7-1/8%. *See* Wyo. Ex. WRIR ED-100 and U.S. Ex. WRIR C-274.[24] As to the fact that the future projects would be financed by the United States, there was also no disagreement. The evidence below, as testified by an expert economist for the United States, was that use of the prime rate in the economic analysis of the future projects was inappropriate since "[i]n these kinds of projects you don't use prime rate because the source of the money is the Federal Government and their long-term rate is more appropriate." Tr. 5078. The "long-term rate" is, of course, the criterion used by the Water Resources Council in formulating its discount rate.

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[23] The discount rate applied by the Water Resources Council has steadily risen since 1979. The discount rate for application for fiscal year 1988 is 8-5/8%. *See* 52 Federal Register 46687, December 9, 1987. At no time since 1979 has the Council's discount rate ever been lower than 7-1/8% and, indeed, it has never since been as low as 7-1/8%.

[24] While these exhibits agreed in their conclusions, they were offered for radically different purposes. Wyoming offered its exhibit to show that no future project was feasible at 7-1/8% and that therefore no decree awarding reserved rights for future projects should be granted. To the contrary, the United States offered its exhibit to show that, in spite of the Congressionally-mandated discount rate, the court should accept a lower discount rate so that the future projects could be justified.

Hence, though the evidence below was uncontradicted that the Federal Government would finance the Reservation's future projects and though the Congressionally-mandated discount rate was 7-1/8%, the Wyoming Supreme Court approved the lower court's application of a discount rate of 4% to justify the massive reserved water right awarded for future projects on the Reservation. In so doing, the Wyoming Supreme Court relied upon the testimony of experts for the United States who opined that a discount rate lower than 7-1/8% should be used, but none of whom disagreed that the Water Resources Council's discount rate was, at the pertinent time, other than 7-1/8%.[25] Consequently, the court ignored Federal law.[26] This Court should grant certiorari to establish the

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[25] In a remarkably disingenuous portion of its opinion, the Wyoming Supreme Court relied upon the fact that the Wyoming's economist, Dr. Brookshire, testified that a range of discount rates of 4%-11% should be applied in this case. Wyoming Petition App. A, at 54a. What the Supreme Court failed to mention was that the master had refused to be limited by the Water Resources Council's determination of discount rate and that Dr. Brookshire consequently applied the range stated above. At no time, however, did Dr. Brookshire or anyone else with Wyoming or any of the cross-petitioners acknowledge that the discount rate to be applied should be anything other than 7-1/8%.

[26] The real basis for the decision below seems to be what the courts perceived as the utter necessity of finding a way to justify an award of a reserved water right for future projects. The Wyoming Supreme Court was significantly divided (3-2) on this issue. While the majority opined that 4% was the proper rate, thereby justifying the future projects, Justice Thomas, writing for the dissent, stated that he "would be appalled as most other concerned citizens should be, if the Congress of the United States, or any other governmental body, began expending money to develop water projects for irrigating these Wyoming lands when far more fertile lands in the midwestern states now are being removed from production due to poor market conditions." Wyoming Petition App. A, at 84a. Justice Thomas went on to describe the Indian future projects as no more than "irrigable academically." *Id.* The master seemed even more concerned than the Wyoming Supreme Court by the possibility that no future project would be feasible if he were

proper Federal standard for the discount rate for determination of the practicably irrigable acreage in the reserved water right context.[27]

III. The Decision Of The Wyoming Supreme Court Regarding The Water Rights Of Non-Indian Successors To Indian Allottees Is In Conflict With The Decisions Of The Ninth Circuit Court Of Appeals.

Several successors in interest to Indian allottees within the Reservation claimed a portion of the Reservation's reserved water right based upon their successor status. Though the master and the district court had rejected the claims of the allottees' successors, the Wyoming Supreme Court held that non-Indian successors to allotted lands are entitled to a portion of the reserved water right quantified for the Reservation, and remanded to the district court with instructions that allottees' successors "must be awarded a reserved water right with an 1868 priority date where the PIA they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter." Wyoming Pe-

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to apply the 7-1/8% discount rate. On the one hand, the Master expressed shock at Wyoming's contention that "not a single acre of the future lands claimed is economically feasible." Wyoming Petition App. H, at 579a. In spite of his professed disagreement with this concept, however, the master also stated that: As it is now, it appears that no matter what benefit-cost ratios are arrived at, or discount figure used, in the real world of today's interest and inflation and uncertainty in agriculture, doubt exists that much of the 'futures' land may ever be a part of any newly constructed irrigation project." *Id.* at 584a.

[27] The Wyoming Supreme Court's decision to ignore that statutory discount rate is also inconsistent with at least one decision of the Tenth Circuit Court of Appeals. *Johnston v. Davis*, 698 F.2d 1088 (10th Cir. 1983). In *Johnston*, the court concluded that Congress intended broad application of the discount rate formula by requiring its application in general terms at 42 U.S.C. § 1962d-17. *Id.*, 698 F.2d at 1092. In spite of Congress' intent broadly to apply the formula, and without any stated rational basis in its opinion, the Wyoming Supreme Court rejected application of the statute in this case.

tition App. A, at 72a-75a.[28] The Wyoming Supreme Court's remand unfortunately conflicts with the standards enunciated by the Ninth Circuit Court of Appeals in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), *cert. denied*, 475 U.S. 1010 (1986). This Court should accept certiorari to resolve that conflict.[29]

There exists a lengthy judicial history regarding the rights of non-Indian successors to Indian allottees within a reservation. The issue was confronted as long ago as 1928 in *United States v. Hibner*, 27 F.2d 909 (D. Idaho 1928) and was addressed, though without definition as to the scope or extent of the right, by this Court in *United States v. Powers*, 305 U.S. 527 (1939). In 1981, however, the Ninth Circuit Court of Appeals for the first time described the scope of the right conveyed to Indian allottees' grantees in *Colville Confederated Tribes v. Walton*. In *Colville*, the Ninth Circuit, relying upon *United States v. Hibner*, ruled that an allottee's successor is entitled to a water right with a priority as of the date of creation of the Reservation for water being appropriated by the Indian allottee at the time title passes and to water appropriated by the non-Indian successor with reasonable diligence after the passage of title, *so long as* the full measure of the reserved water right acquired by the

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[28] As explained by the Wyoming Petition, at note 7, and accompanying text, this remand does not prevent this Court from accepting certiorari.

[29] The issue sought to be reviewed by these cross-petitoners with respect to the rights of allottee's successors is conceptually akin, but not identical, to that raised by the Wyoming Petition at § III.C., page 29. Wyoming seeks certiorari on the issue of the proper priority of an Indian reserved right for lands reacquired by the Tribes from a non-Indian successor to an allottee. The cross-petitioners seek this Court's review of whether or not a non-Indian successor to an allottee may maintain a portion of the reserved water right obtained from the allottee without showing continuous beneficial use from the time of acquisition.

successor is maintained by continued use and not lost by non-use.[30]

In its decision, the Wyoming Supreme Court recognized the rights of allottees' grantees without applying the *Colville* court's limitation that failure to continue use of the water right acquired by the non-Indian grantee would result in its abandonment. Hence, in its remand to the district court, the Wyoming Supreme Court required only that the court establish the inception of such rights but did not order that the district court determine whether or not any such rights had been maintained by continuous use. The court's order is, therefore, in conflict with the Ninth Circuit Court of Appeals in *Colville Confederated Tribes v. Walton.*

This Court should grant certiorari to resolve the conflict between the Ninth Circuit Court of Appeals and the Wyoming Supreme Court and to rule that successors to Indian allottees may rely upon water rights acquired from allottees only if they have maintained such rights with their continuous and uninterrupted use.

IV. The Wyoming Supreme Court's Determination That The United States Was Not Estopped From Claiming A Reserved Water Right To The Detriment Of State And Private Water Users Misapplies The Decisions Of This Court And Is In Conflict With The Decisions Of The Circuit Courts Of Appeals.

This Court has, on more than one occasion, refused flatly to rule that estoppel may not under any circumstances be applied against the United States. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). While the Court has assuredly im-

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[30] The fact a non-Indian successor to the reserved water right may abandon that water right by non-use is one of the crucial distinctions between the reserved right on behalf of Indians and that which may be acquired by non-Indians. *See Colville Confederated Tribes v. Walton*, 647 F.2d at 51.

posed a heavy burden upon those who would assert estoppel against the government, the Court also has indicated that when a private party is deprived of a thing to which he is entitled as of right,[31] when a new rule is applied retroactively in a way which intrudes upon a party's interests,[32] or when the conduct giving rise to the estoppel is that of the general government acting by Congress itself, and not merely that of its agents,[33] then estoppel may apply against the government.

This Court has also discussed, in its opinions on the estoppel issue, whether or not, in addition to proving the commonly accepted bases for the application of equitable estoppel,[34] one must also show the government's affirmative misconduct to work an estoppel against it. This Court has neither required nor dismissed the need for such a showing,[35] though certain lower Federal courts have imposed that requirement upon parties complaining

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[31] *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). *See also Moser v. United States*, 341 U.S. 41 (1951).

[32] *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). *See also NLRB v. Bell AeroSpace Co.*, 416 U.S. 267 (1974); *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

[33] *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).

[34] In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, at 59, this Court stated that the party claiming estoppel must show that it has relied on its adversary's conduct in such a manner as to change its position for the worse, that the reliance must have been reasonable and that the party claiming estoppel did not know nor should it have known that its adversary's conduct was misleading.

[35] *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *Schweiker v. Hansen*, 451 U.S. 1032 (1981).

of governmental duplicity, at least when the United States acts by its agents, rather than by Congress itself.[36]

These cross-petitioners have asserted throughout that, whether affirmative misconduct is or is not an element of estoppel in this case, it is a proper case in which to estop the United States from claiming a Federal reserved water right which will damage the water rights of state and private parties acquired with the support and at the direction of the United States. The Wyoming Supreme Court disagreed, however, and rejected application of equitable estoppel on the sole basis that the United States' affirmative misconduct had not been proved. Wyoming Petition App. A, at 22a-23a. This Court, to clarify whether equitable estoppel may be applied against the United States and, if so, whether it must be based upon a showing of affirmative misconduct, and to correct the harsh and unjust application of the Federal reserved right doctrine below should grant certiorari. This is a case fundamentally well-suited to resolve these issues, since the estoppel merited by the facts herein results not from the random acts of minor governmental functionaries but from the policies of the United States established by Congress itself.[37]

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[36] *See*, for example, *Lavin v. Marsh*, 644 F.2d 1378 (9th Cir. 1981), holding that a party claiming estoppel against the government must show affirmative misconduct as opposed to a mere failure to inform or assist, 644 F.2d at 1382, and appearing to demand a pattern of false promises rather than mere negligence on the part of the government to invoke estoppel. 644 F.2d at 1383. *See also Green v. United States Department of Labor*, 775 F.2d 964 (8th Cir. 1985); *United States v. River Coal Co.*, 748 F.2d 1103 (6th Cir. 1984).

[37] In *Heckler*, 467 U.S. at 60, this Court again expressed the view that to estop the government based upon the conduct of its agents is to undermine the interests of the citizenry as a whole in obedience to the rule of law. This concern has no bearing in a case such as this in which the conduct of the sovereign itself is called into question.

Though the Wyoming Supreme Court did conclude that a showing of affirmative misconduct had not been made below, it did not disturb, and in fact endorsed, certain of the findings below which were the basis of the district court's application of estoppel. Wyoming Petition App. A, at 23a.[38] The district court found that Congress had acknowledged, in the various land disposition statutes under which settlement proceeded, its awareness that water was necessary for successful settlement of the arid lands of the west and had acceeded to prior appropriation as the means to secure such water. Wyoming Petition App. F, 259a-260a, Findings of Fact 107-110. *See also* Wyoming Petition App. H, at 628a-629a and 688a-689a, Findings of Fact I.3.-I.6. and Wyoming Petition App. A, at 23a. Indeed, the evidence below revealed that Congress not only recognized the importance of water in its land disposal acts, but that it demanded proof of a secure water supply before it would allow a land patent to issue to western homesteaders.[39]

The evidence below also revealed that Congress' inducement to pioneer families to settle the western lands, through the land disposition acts, was remarkably successful within Wyoming's Water Division 3. Wyoming Petition App. F, at 259a-260a, Findings of Fact 106-112. *See also* Wyoming Petition App. H, at 624a. The district court found that over 250,000 acres of land in Water Division 3 were productively settled by the predecessors in interest to the private parties in this adjudication. Wyoming Petition App. F, at 260a, Finding of

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[38] The estoppel doctrine was applied by Judge Joffe in his ruling appearing at Wyoming Petition App. F, at 230a-237a, *et seq.* Judge Johnson, who was appointed after Judge Joffe's retirement following the taking of all the evidence in the case, overturned Judge Joffe's ruling on the basis that no affirmative misconduct had been shown on the part of the United States. Wyoming Petition App. E, at 196a.

[39] *See* notes 2 and 4, *supra*.

Fact 111. *See also* Wyoming Petition App. H, at 629a. At the same time that non-Indian settlement was speedily proceeding in the Big Horn Basin under the land disposition laws, Congress enacted the 1905 Act which advertised to the world that the water rights for the Reservation would, like those of non-Indians, be obtained in accordance with Wyoming law.[40]

Finally, the effect of the Federal reserved water right awarded below is well documented. Both the master and the initial district court ruling unequivocally ruled that the reserved water right awarded would severely dimish preexisting water rights of state and private parties. Wyoming Petition App. H, at 688a-690a, Findings of Fact I.1. through I.12.; Wyoming Petition App. F, at 258a, Finding of Fact 98.

Under these circumstances, a failure to apply estoppel misapplies the decisions of this Court which have permitted its application against the United States under proper circumstances. First, it is established that the reserved water right implied below will severely damage the vested water rights to which these cross-petitioners and their predecessors have been entitled and have relied upon for nearly 100 years. Second, application of the reserved right doctrine at this late date on the Res-

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[40] It is not difficult to imagine how the settlement of the West would have been affected had the ancestors of these cross-petitioners and other pioneers known that vast amounts of the water appropriated by them under state law had previously been reserved to the use of the many Indian tribes scattered throughout the West. As Preston and Engle, note 12, *supra*, at 2231-2232, commented: "Had the *Winters* decision been promulgated in 1848 instead of 1908, it would have effectually barred the settlement and development of much of the arid regions of the West, as in that case the pioneer, knowing that there was a probability that at some time he would be required to relinquish his water supply to the Indians, would have had little or no incentive to build irrigation systems and place the land under cultivation."

ervation applies a new rule, contrary to the 1905 Act, for the establishment of water rights on the Reservation which will damage these cross-petitioners. Finally, the land disposition acts, which induced the predecessors of these cross-petitioners to settle the dry western territories of this country, were not the unlawful act of a minor official or agent of the government, but were instead the coordinated policy of the United States as enacted into law by Congress.

The Wyoming Supreme Court's failure to apply estoppel is also inconsistent with the decisions of the several courts of appeal which have found the necessity for affirmative misconduct as an element of estoppel against the United States. *See*, for example, *Lavin v. Marsh*, 644 F.2d 1378 (9th Cir. 1981). If, as required by *Lavin*, a pattern of false promises on the part of the government is required to invoke estoppel, such is present in the assurances of the Federal Government that water would be available to settlers on the public lands of the Big Horn Basin under the laws of Wyoming and that the water rights of the Reservation, like those of non-Indians, would be obtained under the auspices of that same law. To permit the United States now to ignore its promises to the non-Indian settlers of the Basin in order to claim a reserved water right for the Reservation which is largely duplicative of that already securely established by permit under Wyoming law would undermine the "minimum standards of decency, honor, and reliability" which citizens may expect in dealing with their government. *Heckler v. Community Health Services of Crawford County, Inc.*, 409 U.S. at 60-61.[41]

---

[41] The master noted, as he struggled with application of the doctrine of estoppel below, that "the United States is duty bound to compensate those who will be harmed." Wyoming Petition App. H, at 626a. The master's statement is almost identical to Preston and Engle's report to Congress in 1928 in which they recommended that "in making practical application of this [*Winters*] principle, the

For these reasons, this Court should accept certiorari herein in order to clarify the application of the doctrine of estoppel as it may work against the United States and to conclude that the doctrine may properly be applied on the facts herein.

CONCLUSION

For the reasons stated above, these cross-petitioners respectfully request the order of this Court granting this petition for writ of certiorari to the Supreme Court of the State of Wyoming.

Respectfully submitted,

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September 21, 1988

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Government, and not the pioneer, should stand whatever losses may result from the Government's failure to properly protect the Indians and their water rights. In our judgment, the government owes a duty to the pioneers, as well as to the Indians. It should be kept in mind that 'the winning of the West' is the work of the pioneer. The pioneers, acting upon the tacit, if not the express, invitation of the Government have subdued the western arid regions and made them habitable for man." Preston and Engle, note 12, *supra*, at 2231.

APPENDICES

APPENDIX A

August 2, 1988

Wind River Irrigation Project

Operational Guidelines—Crowheart Area

1. All water users will receive a delivery ratio of 1 cubic foot per second for each 70 acres of irrigated land.
2. After all lands receive the water described in (1) above the 1868 trust land water right will be met by increasing the 1:70 ratio as is appropriate for the available supply of water.
3. After the demands of the 1868 trust land right are met the balance of undelivered water will be distributed to the junior rights of the project.
4. It will be permissible to consolidate heads to increase flow, provided the consolidation *will not* exceed the total established delivery ratio for the heads involved.
5. As long as a water shortage exists, no deliveries will be made to stubble ground. Stubble ground with new seeding *will* receive water.
6. All non-Indian fee land with a possible 1868 right will be treated as a junior right, until that right is confirmed by the District Court.
7. All provisions of the 25 CFR 171 continue to apply. Particular attention must be directed at curtailment of water waste and all water must be put to beneficial use.
8. All headgates will be locked and operated only by Irrigation System Operators.

/s/ [Illegible]
Superintendent,
Wind River Agency

APPENDIX B

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

PETITION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTION

COMES NOW Sky D. Phifer, Attorney for non-Indian water users on the Reservation, and hereby moves the Court for a Temporary Restraining Order and Injunction preventing the United States, through the Bureau of Indian Affairs, Department of the Interior, from applying an 1868 priority date to the Reservation and affirmatively states to the Court as follows:

1. Pursuant to a memorandum from the Billings Area Director to the Superintendent, Wind River Agency, the Superintendent is directed to honor the Indian reserved right claim using the priority date and amount in the adjudication. (See attached Exhibit A. "Memorandum.") Don Crook, acting Superintendent of the Wind River Agency, has informed Sky D. Phifer, Attorney, that beginning last Thursday, July 14th, they began to apply the 1868 priority date to the Crowheart area and turn off water to non-Indian users.

2. The decision by the BIA was erroneous for the following reasons:

a. The Supreme Court of the State of Wyoming issued its decision in this matter on February 24th, 1988 with the following Conclusion:

> The Amended Judgment and Decree is affirmed in part, reversed in part, and remanded to the District Court for further proceedings consistent with this opinion.

Rule 7.03 of the Wyoming Rules of Appellate Procedure provides: "When a judgment or final order is reversed, either in whole or in part, in the district court, or the Supreme Court the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the *court below for such judgment or such proceedings as the reviewing court may direct.*" (Emphasis added).

It is very clear from the conclusion of the Wyoming Supreme Court decision in this matter that the case is to be remanded back for a final decree to be entered by the District Court subsequent to the further proceedings set out in with the Supreme Court decision.

There further has been no decree or final judgment entered giving any particular parcel an 1868 priority date. All the decrees have done so far is to quantify the reserved right leading to an 1868 priority date leaving to further proceedings the actual judgment or decree which will provide an 1868 priority date for any particular parcel out on the Reservation, therefore, there is absolutely no basis for exercising a priority for any particular parcel out on the Reservation over another parcel.

b. As further grounds, the Shoshone tribe, the Arapahoe tribe, and the State of Wyoming, have all received extensions from the United States Supreme Court up to and including August 20th, 1988, to submit petitions to the United States Supreme Court for certiorari. Ob-

viously, these parties do not feel that this matter has been finally adjudicated.

c. Thirdly, the BIA at the Wind River Indian Reservation, has absolutely no way to measure the amount of water being delivered to any parcel on the reservation, so as to be able to implement an 1868 priority date in the proper amounts.

3. As is shown by the affidavits of Brad Eastman and Jim Fike, attached hereto made a part hereof, the non-Indians on the reservation stand to suffer immediate and irreparable injury if the status quo (meaning all water users on the Reservation being treated equally until final disposition of the water rights suit) is not maintained.

WHEREFORE the following relief is prayed for:

1. A Temporary Restraining Order restraining the Bureau of America from implementing or applying an 1868 priority date to the Reservation;

2. For an Order setting this matter for hearing on an Injunction preventing the Bureau of Indian Affairs, Department of Interior, United States of America from applying or implementing their 1868 priority date pending the final adjudication in this matter and implementation of a system of measurement on the irrigation projects on the Reservation.

DATED this 19th day of July, 1988.

/s/ Sky D Phifer
SKY D PHIFER
P.O. Box 1720
Lander, WY 82520
(307) 332-5743

CERTIFICATE OF SERVICE

I, Sky D Phifer, hereby certify that a true and correct copy of the foregoing Petition for Temporary Restraining Order and Injunction was served upon the following by placing the same in the United States mail, postage prepaid, and addressed to:

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on this 19th day of July, 1988.

/s/ Sky D Phifer
SKY D PHIFER

EXHIBIT A

UNITED STATES GOVERNMENT
MEMORANDUM

Date: Jul. 6, 1988

Reply to Attn. of: Division of Programs, Water Resources, Code 380

Subject: Big Horn Adjudication

To: Superintendent, Wind River Agency

From: Billings Area Director

This memorandum will document the June 29, 1988, telephone conversation between Mr. Don Crook, Acting Superintendent, Wind River Agency, and Mr. Robert Delk, of my staff. We have discussed your concerns with Mr. James Clear from the Department of Justice (DOJ) and Mr. Richard Aldrich, Billings Field Solicitor. Both attorneys agree that there is nothing in the Wyoming Supreme Court decision to preclude the tribes from demanding their reserved water right immediately.

If the tribes make such a demand, you are directed to immediately honor the Indian reserved water right claim using the priority date and amount in the adjudication. We fully realize that the physical structure of the project makes this difficult, if not impossible. A water management plan is needed immediately as well as a long range plan to guide the operation of the project in the future.

We recommend a meeting in Billings on July 21, 1988, to develop a water plan for this year and an outline for a future operational plan. Suggested attendees at this meeting include the Wind River Superintendent, the Project Engineer, Area Office personnel, attorneys from the DOJ and the Office of the Solicitor and selected BIA personnel from other areas that have had experience with this issue.

We will inform you as soon as possible as to the time and place of the meeting.

/s/ Norris M. Cole

AFFIDAVIT

JAMES FIKE, being duly sworn under oath according to law, deposes and says:

1. That I am non-Indian and own the following described real property on the Wind River Indian Reservation which consists of two hundred ten (210) irrigated acres, towit:

> SE¼ NE¼, E½ SE¼ Section 22; S½ NW¼ NW¼, SW¼ NW¼, W½ SW¼, Section 23, Township 4 North, Range 4 West, W.R.M., Fremont County, Wyoming.

2. That I have five (5) headgates to this property.

3. On July 7th, 1988 my water was shut off on a normal rotation and should have been turned back on July 17th, 1988, but I was informed by BIA officials and ditch riders on July 14th, 1988 that my headgates would not be turned on because they were giving the water to Indian users and when the Indian users were satisfied they would turn on water to the non-Indian users.

4. There is thirty (30) acres of alfalfa and one hundred twenty (120) acres of irrigated pasture burning up and I will suffer irreparable damage if water is not delivered on the property within a very short period of time.

5. That I have sixty (60) acres planted in oats which I use for a fall hay crop and it is my practice to start irrigating that acreage now so that it will be ready to harvest in the fall. If I do not get water on these oats, I will suffer immediate and irreparable injury in that the crop will not have time to mature and I will lose between 150 ton of hay which my ranch operations cannot afford to lose.

6. On Monday, July 17th, 1988 the BIA delivered a head of water to me. But even with one head I could

only salvage my pasture and I would lose all my alfalfa and oat crops.

7. That I have not been given any reassurances that water will be delivered to me by BIA officials.

8. That there is no measurement system in use by the BIA irrigation office.

9. I have irrigated property for the last fifty (50) years on the Wind River Reservation.

10. I would normally run three (3) heads of water at this time and I feel that there is sufficient water on a rotation basis for all water users to produce their crops.

FURTHER AFFIANT SAYETH NOT.

/s/ James Fike, Sr.
JAMES FIKE

STATE OF WYOMING)
) ss
COUNTY OF FREMONT)

The foregoing Affidavit was subscribed and sworn to this 18th day of July, 1988, by the above named James Fike, known by me to be the person named as the Affiant.

(SEAL)

/s/ Sky D Phifer
Notary Public

My commission expires: 11/1/89

AFFIDAVIT

BRAD EASTMAN, being duly sworn under oath according to law, and says:

1. That I and my wife Mary Ann own the following described real property on the Wind River Indian Reservation consisting of approximately two hundred and nine irrigated acres, towit:

W½ SW¼, S½ SW¼ NW¼ Section 28:
N½ NW¼ NW¼ Section 33:
NW¼, S½ NE¼, Section 29
T4N, R3W W.R.M., Fremont County, Wyoming

2. That I am ranch manager for the following described real property on the Wind River Indian Reservation consisting of approximately five hundred irrigated acres owned by Robert L. and Jane G. Mitchell described as follows:

S½ of Lots 3 & 4, ALL of Lot 6, S½NW, SWNE, NWSE, N½SWSW, N½ N½SESW Section 4 T4N, R 4W:

Lot 3, S½NW, S½SE, NESW Section 24 T5N R5W, W.R.M. Fremont County, Wyoming.

3. As of July 14th, 1988 I was informed by Don Crook, acting Superintendent of the Wind River Indian Reservation, and Louis Twitchell who is in charge of BIA irrigation, that they were giving preference to Indians pursuant to an 1868 water right and shutting off all non-Indians. They then shut off all of the water to the company to which I manage for, Mr. & Mrs. Mitchell.

4. I was informed on July 18th, 1988 that each non-Indian was to get one head of water (head-gate) and that the ditch riders did in fact turn on one head-gate to both the property owned by me and my wife and the property owned by Mr. & Mrs. Mitchell.

5. One head is insufficient to irrigate my home property as I have nine (9) head-gates and I will suffer immediate and irreparable injury and that I will have to sacrifice half of my fields in order to irrigate the other half as one head of water is insufficient to irrigate my fields.

6. The Mitchell property consists of two separate holdings, with only one parcel up on the bench serviced by the Dinwoody Canal. The other parcel takes water directly from the river and so far has not been affected. The upper parcel up on the bench has been shut done to one head-gate of water and stands to have immediate and irreparable injury in that two of the three fields will have insufficient water and burn up under the present management and priority system established by the BIA. The one head of water goes for each non-Indian, whether or not that non-Indian owns ten acres or five hundred irrigated acres.

7. The BIA irrigation system has no way of measuring the amount of water delivery to any particular parcel. Even delivering one head of water to each non-Indian, varies because each head gate is of a different size and delivers a different quantity of water.

8. I've irrigated in the Crowheart area for the last thirteen years and in my opinion there is sufficient water, on a rotation basis which we have used in years past for everyone to get by without any fields burning up.

FURTHER AFFIANT SAYETH NOT.

/s/ Brad Eastman
BRAD EASTMAN

STATE OF WYOMING)
) ss
COUNTY OF FREMONT)

The foregoing Affidavit was subscribed and sworn to this 18th day of July, 1988, by the above named Brad Eastman, known by me to be the person named as the Affiant.

/s/ Sky D Phifer
Notary Public

My Commission Expires: 11/1/89

AFFIDAVIT

SKY D PHIFER, being duly sworn under oath according to law, deposes and says:

1. That I am attorney far various non-Indian owners of real property and irrigators on the Wind River Indian Reservation.

2. That I have been informed by Don Crook, acting Superintendent of the Wind River Indian Reservation, that pursuant to a memo he received from the Billings area director he was to begin applying an 1868 priority date to the Wind River Indian Reservation and that as of Thursday, July 14th, 1988 he began implementing an 1868 priority date in the Crowheart area of the Wind River Indian Reservation which involved delivery of water to Indian water users, and juggling whatever excess water there might be amongst the non-Indians, or in other words, begun to shut off non-Indian users.

3. Mr. Crook further informed me that there was no way of measurement in the ditches on the Wind River Reservation and so there was no way to implement the priority system on the Reservation with any degree of precision.

FURTHER AFFIANT SAYETH NOT dated this 19th, day of July, 1988.

/s/ Sky D Phifer

SKY D PHIFER
P.O. Box 1720
Lander, WY 82520
(307) 332-5743

STATE OF WYOMING)
) ss
COUNTY OF FREMONT)

Subscribed and sworn to this 19th day of July, 1988, by the above named Sky D Phifer, known to me to be the person named as the Affiant.

/s/ Betsy Gilman

IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

CERTIFICATION

COMES NOW Sky D Phifer, attorney, and hereby certifies to the Court:

1. I contacted the attorney for the United States, the attorney for the Shoshone Tribe, the attorney for the State of Wyoming, and the acting Superintendent of the Wind River Indian Reservation on the 18th day of July, 1988 and told them of my intention to seek a Temporary Restraining Order on the 19th in front of Judge Hartman, Fifth Judicial District, State of Wyoming. I also attempted to get ahold of the attorney for the Arapahoe Tribe, but was unable to contact to him due to the lateness of the day and the time zone differences between here and Washington, D.C.

2. I was unable to tell any of the attornies which time I would be seeking the Temporary Restraining Order as I was unable to arrange a time with Judge Hartman on the 18th of July, 1988.

3. Further notice should not be required, as the attorney's for all major parties are spread out over the country with two in Washington D.C., one in Albuquerque, NM, and the other in Cheyenne, WY. I further was unable to arrange for a specific time upon which I would

be seeking the Temporary Restraining Order to inform the other parties.

4. Further the Temporary Restraining Order is necessary to prevent immediate and irreparable injury to the non-Indian water users on the Wind River Indian Reservation.

DATED this 19th day of July, 1988.

/s/ Sky D Phifer
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P.O. Box 1720
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CERTIFICATE OF SERVICE

I, Sky D Phifer, hereby certify that a true and correct copy of the foregoing Certification was served upon the following by placing the same in the United States mail, postage prepaid, and addressed to:

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on this 19th day of July, 1988.

/s/ Sky D Phifer
SKY D PHIFER

No. 88-309 and 88-553

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF WYOMING

Petitioner,

v.

UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*

Respondents.

CITY OF RIVERTON, WYOMING, *et al.*,

Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*

Cross-Respondents.

On Petition and Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming

BRIEF IN OPPOSITION FOR RESPONDENTS AND CROSS-RESPONDENTS SHOSHONE AND NORTHERN ARAPAHO TRIBES

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November 21, 1988

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QUESTIONS PRESENTED

In this case, which involves the water rights of the Shoshone and Northern Arapaho Tribes (the "Tribes") of the Wind River Indian Reservation (the "Reservation"), the Supreme Court of Wyoming ruled unanimously that water rights were impliedly reserved for the Tribes under the Second Treaty of Fort Bridger (the "Treaty"), 15 Stat. 673, pursuant to which the Reservation was established in 1868. The Wyoming Supreme Court also ruled unanimously that the proper measure of the amount of water reserved for the agricultural purposes of the Reservation was the "practicably irrigable acreage" standard adopted by this Court in *Arizona v. California*, 373 U.S. 546, 595-601 (1963).

The questions presented by the petition in No. 88-309 are:

1. Whether the Court should review the rulings below that, in accordance with *Winters v. United States*, 207 U.S. 564 (1908) and its progeny, water rights were impliedly reserved under the Treaty, and that those rights were not abrogated or superseded by a 1905 statute that earmarked certain funds—a portion of the Indians' own proceeds from land sales under the statute—for the purpose of "securing" their water rights from challenge by the State of Wyoming.

2. Whether the Court should review the ruling below that applied the practicably irrigable acreage standard, a standard described by this Court in *Arizona v. California*, 373 U.S. at 601, as "the only

feasible and fair way" to quantify Indian reserved water rights for agricultural purposes.

3. Whether the Court should review the ruling below that assigned a priority date of 1868—the date of the Treaty—to the water rights reserved under the Treaty.

The questions presented by the cross-petition in No. 88-553 are:

1. Whether the Court should review the ruling below that rejected the proposed water-storage requirements and other preconditions on the exercise of the Tribes' reserved water rights under the Treaty, a ruling that expressly considered and is fully consistent with this Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978).

2. Whether the Court should review the ruling below that applied an economic discount rate fully supported by the evidence, a ruling that is not in conflict with any other decision.

3. Whether the Court should review the ruling below regarding the proper priority date to be assigned to reserved water rights associated with land within the Reservation that is now owned by non-Indians.

4. Whether the Court should review the ruling below that rejected the insubstantial claim that the United States should be estopped from asserting reserved water rights on behalf of the Tribes in this proceeding.

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BRIEF IN OPPOSITION FOR RESPONDENTS AND CROSS-RESPONDENTS SHOSHONE AND NORTHERN ARAPAHO TRIBES

Respondents and Cross-Respondents the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation in Wyoming respectfully request that this Court deny the Petition for a Writ of Certiorari of the State of Wyoming in No. 88-309 and the Cross-Petition for a Writ of Certiorari of the City of Riverton, Wyoming, *et al.* ("Riverton"), in No. 88-553. This brief is submitted in opposition to both the petition and the cross-petition in accordance with Justice White's Order of November 16, 1988.

STATEMENT OF THE CASE

This case concerns the reserved water rights of the Shoshone and Northern Arapaho Indian Tribes under the Second Treaty of Fort Bridger, Act of July 3, 1868, 15 Stat. 673, pursuant to which the United States set apart the Wind River Indian Reservation as a permanent homeland—originally for the Shoshone Tribe and, later, for both the Shoshone and the Northern Arapaho Tribes (the "Tribes").

History of the Wind River Indian Reservation

In 1868, the United States and the Shoshone Tribe, which were military allies and had long maintained friendly relations, entered into the Second Treaty of Fort Bridger (the "Treaty"). 15 Stat. 673; Petitioner's Appendix ("Pet. App.") at 9a, 793a. Under its terms, the United States "set apart" a tract of land—approximately 3,054,182 acres—in what was later to become the State of Wyoming "for the absolute and undisturbed use and occupation of the Shoshonee Indians." Treaty at art. 2. In return, the Shoshone Tribe agreed to make this reservation, now known as the Wind River Indian Reservation (the "Reservation"), its "permanent home." *Id.* at art. 4. The Tribe

further agreed to "relinquish all title, claims, or rights" to a vast tract of 44,672,000 acres of land in what are now the States of Wyoming, Colorado, and Utah that had been recognized as "Shoshonee country" under a prior treaty, known as the First Treaty of Fort Bridger, 18 Stat. 685 (Part 3) (1863). Treaty at art. 2; Pet. App. at 9a.

The Shoshones had been a nomadic people dependent upon hunting and fishing for their subsistence. Pet. App. at 9a, 617a-18a, 686a. Accordingly, they faced an enormous transition in converting from their traditional ways to life on the Reservation.

One of the purposes of the Treaty was to assist the Shoshones in making this transition by "help[ing] to create an independent permanent farming community upon the reservation." *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938). In various provisions of the Treaty, the United States agreed to assist and encourage the Tribe in the agricultural development of the Reservation. Treaty at arts. 3, 6-10, 12.

The United States also permitted the Shoshones, whose "loyalty . . . to the people of the United States has been conspicuous and unfaltering," *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937), to select the lands that were to comprise the Reservation. Petition ("Pet.") at 4. The Shoshones selected lands that were ideally suited for agricultural development. As a result of the abundant runoff from the Wind River Mountains, the selected lands, though located in a semi-arid region, were "the choicest and best-watered portion of Wyoming" and included "fertile river valleys conveniently irrigable." *United States v. Shoshone Tribe*, 304 U.S. at 114. The United States reserved these lands by Treaty for the permanent homeland of the Shoshones before the Territory of Wyoming was created and more than twenty-one years before Wyoming was admitted into the Union in 1890.

Although originally set apart for only the Shoshone Tribe, the Reservation has since become the permanent homeland of both the Shoshone and Northern Arapaho Tribes. The two Tribes have jointly occupied the Reservation since 1878. Pet. App. at 9a-10a.

In 1872 and 1896, the Tribes agreed to cede back to the United States certain portions of the original Reservation in return for fixed cash payments.[1] The 1896 cession had been sought by the Tribes as a means of raising desperately needed cash. *Id.* at 10a. The transition to Reservation life proved to be slow and difficult, and, notwithstanding the ample water and fertile lands on the Reservation, the early attempts of the Indians to develop an agricultural economy had failed. *Id.* Indeed, by 1895 the Tribes had become totally dependent on the United States for food, clothing and shelter. *Id.*

In 1904 the Tribes, still experiencing substantial problems in developing an agricultural economy, entered into an agreement with the United States, later ratified by Congress in the Act of March 3, 1905 (the "1905 Act"). 33 Stat. 1016; Pet. App. at 769a. Under the 1905 Act, the United States was authorized to act as trustee for the Tribes in opening for non-Indian settlement approximately 1,480,000 acres of the Reservation, essentially its northern two-thirds. The 1905 Act, unlike the earlier cessions, did not involve an outright sale of Reservation lands in return for a fixed cash payment. Rather, the United States agreed to act only "as trustee for said Indians to dispose of said lands," and obligated itself to pay the Tribes "the proceeds received from the sale [of the opened lands] only as [those payments were] received [by the Government]." 1905 Act at art. 9; Pet. App. at 774a.

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[1] Brunot Agreement, 18 Stat. 291 (Shoshone Tribe ceding 700,642 acres for $27,500); First McLaughlin Agreement, 30 Stat. 62, 93-95 (Shoshone and Northern Arapaho Tribes ceding 55,000 acres "and the water rights appertaining thereunto" for $60,000).

The opening for settlement of the northern portion of the Reservation, though much heralded, proved to be a dismal failure. The congressman who sponsored the 1905 Act had predicted that land sales would generate $1.8 million, but by 1914 only 128,986 acres—less than 10 per cent of the opened portion of the Reservation—had been sold for little more than $250,000. Pet. App. at 412a. In 1915, as a result of the minimal demand for these lands, the Secretary of the Interior temporarily discontinued further sales of the opened lands, and, from 1915 through 1934, only a few tracts involving a small number of acres were sold. *Id.* at 412a-13a. In 1934, the Secretary again discontinued such sales. Thereafter, the trust arrangement pursuant to which the opened lands were offered for sale by the United States was formally terminated. *Id.* at 413a. Most of the opened lands are still owned by the Tribes.

The Shoshones and Northern Arapahos are now engaged in irrigated farming on substantial portions of the Reservation, *id.* at 463a-531a, but there remain large unfarmed tracts of irrigable Reservation land. *Id.* at 532a-80a; 229a-30a.

History of the Adjudication

The State of Wyoming initiated this adjudication of the Tribes' reserved water rights under the Treaty more than a decade ago in Wyoming's own state courts in connection with a general adjudication of water rights in the Big Horn River Basin. Wyoming obtained jurisdiction to adjudicate the water rights of the Tribes by joining the United States in the state-court proceeding pursuant to a jurisdictional statute enacted by the State Legislature only two days before the proceeding was filed. Wyo. Stat. § 1-37-106 (1977); Pet. App. at 726a. This statute was designed to permit the State to litigate this proceeding in state, rather than federal, court.[2]

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[2] The statute—which Wyoming has used only in connection with this proceeding—was specifically tailored to meet the requirements of the

The United States and the Tribes sought to defeat the State's choice of forum, but these efforts were strenuously and successfully opposed by the State.[3] Thereafter, the Tribes intervened in the state proceeding to protect their water rights under the Treaty.

In May 1979, the state district court appointed a Special Master approved by all the parties to conduct the adjudication.[4] The Special Master divided the proceeding into three phases. The first phase—the only one at issue here—was a determination of Indian reserved water rights.

On December 15, 1982, following several years of extensive pretrial discovery as well as conferences and hearings involving "more than 100 attorneys, transcripts of more than 15,000 pages and over 2,300 exhibits," Pet. App. at 14a, the Special Master signed his 451-page Report and proposed Decree regarding the water rights reserved for the Tribes under the Treaty. *Id.* at 367a.

The Rulings Below

The Special Master flatly rejected the State's argument that water rights were not reserved under the Treaty. Relying upon *Winters v. United States*, 207 U.S. 564 (1908)

McCarran Amendment, 43 U.S.C. § 666, as elaborated by this Court in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), for waiver of sovereign immunity by the United States in state water adjudications. Pet. App. at 389a-93a.

[3] When the United States petitioned to remove the proceeding to federal district court, the State persuaded that court to remand the proceeding to state court in light of the McCarran Amendment and this Court's decision in *Colorado River*. Pet. App. at 720a-723a; *see supra* note 2. After remand to the state court, Wyoming successfully opposed a motion by the United States, which the Tribes had supported, to dismiss the state proceeding on the ground that the state court lacked jurisdiction to resolve the reserved water rights of the Tribes and the United States. *Id.* at 11a-12a.

[4] The Special Master, the Honorable Teno Roncalio, had previously served as a Member of the United States House of Representatives from Wyoming.

("*Winters*"), and its progeny—in which this Court has consistently held that, when Indian reservations were established, water rights were impliedly reserved to satisfy the purposes of the reservations—the Special Master ruled that "Congress, by the Treaty of 1868, impliedly created a reservation for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty." Pet. App. at 432a. With respect to the Treaty's purpose of promoting agriculture, the Special Master ruled that the proper measure of the amount of water reserved under the Treaty was that necessary to irrigate all the "practicably irrigable acres" on the Reservation (the "PIA standard"). *Id.* at 532a. The Special Master then quantified that amount in a painstaking analysis of the massive evidentiary record. *Id.* at 446a-580a. In applying the PIA standard, the Special Master noted that he was following this Court's ruling in *Arizona v. California*, 373 U.S. 546, 601 (1963), that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." Pet. App. at 532a.

The Special Master further held that the purpose of the Treaty was to permit the Indians to develop a "permanent homeland" on the Reservation, a purpose broader than simply developing an agricultural economy. *Id.* at 441a-42a. Accordingly, he ruled that the total amount of water reserved under the Treaty included not only that quantified under the PIA standard, but also that necessary for certain non-agricultural uses, including mineral development, municipal uses, and fisheries. *Id.*

The district court affirmed the Special Master's ruling that water rights were reserved under the Treaty, rejecting the State's argument as contrary not only to "this Court's interpretation of what the intent of Congress was but also . . . to the controlling case law on the subject." *Id.* at 211a. The district court also affirmed the Special Master's use of the PIA standard. *Id.* at 228a-29a. But the district court rejected the Special Master's ruling that

the purpose of the Reservation was to create a permanent homeland for the Indians, holding instead that the purpose was "to convert the Indians from a nomadic to an agrarian people." *Id.* at 219a. Having concluded that "the sole purpose of the Reservation was agriculture," *id.* at 220a, the court reduced the total amount of water quantified by the Special Master to only that determined by the PIA standard. *Id.* at 221a.

The Supreme Court of Wyoming, affirming the rulings of the Special Master and the district court, held that there was "an intent to reserve water" under the Treaty, *id.* at 26a, and that it was "correct [to] quantify[] the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage." *Id.* at 47a. Contrary to the ruling of the Special Master, the Supreme Court of Wyoming, by a vote of three to two, affirmed the district court's ruling regarding the purpose of the Reservation, holding that "the intent at the time [of the Treaty was] to create a reservation with a sole agricultural purpose." *Id.* at 38a. In light of this conclusion, the state supreme court majority affirmed the reduction of the amount of water reserved for the Tribes to only that quantified under the PIA standard.

REASONS FOR DENYING THE WRIT

The State of Wyoming initiated this adjudication involving the federal treaty rights of the Tribes over a decade ago in Wyoming's own state courts pursuant to a specially enacted jurisdictional statute, and vigorously resisted the efforts of the United States and the Tribes to defeat the State's choice of forum. The State ultimately won the right to litigate the dispute in its own courts.

Wyoming then attempted to exploit its home-court advantage by challenging even the most basic rights of the Tribes under the Treaty. First, even though reserved water rights under the Treaty had been recognized judicially as

early as 1926, the State sought to revisit the issue, urging the Wyoming courts to rule that there are no such rights under the Treaty. Second, notwithstanding this Court's definitive ruling on the PIA standard in *Arizona v. California*, 373 U.S. 546, 600-01 (1963) ("*Arizona I*"), the State argued that, if there are reserved water rights under the Treaty, the PIA standard is too generous a measure of those rights.

The Wyoming courts rejected both of the State's arguments, concluding that they were contrary to controlling precedents of this Court and to prior case law specifically recognizing reserved water rights under the Treaty. Indeed, the State lost these issues at *every* level of its own state court system.

Neither of these issues—nor for that matter any of the litany of other issues raised by Wyoming and Riverton—warrants review. In ruling that the Treaty created reserved water rights, the Wyoming courts properly held that this case was controlled by *Winters* and its progeny. The State's principal argument below—and again here—is that the so-called "water proviso" to the 1905 Act somehow effected a taking of the Tribes' vested property by terminating their reserved water rights under the 1868 Treaty. But, as the Wyoming courts correctly ruled, the water proviso, which simply governed how a portion of the Indians' own proceeds from 1905 Act land sales were to be spent, falls far short of that necessary to meet this Court's strict standards for finding an abrogation of Indian treaty rights. In any event, review is not warranted because the issue—which turns on the unique statutory language, legislative history and contemporaneous administrative interpretation of the water proviso—has no general applicability.

With respect to the PIA standard, the Wyoming courts correctly followed *Arizona I*, 373 U.S. at 595-601, where

this Court, after considering several other proposed standards for quantifying reserved water rights for agricultural purposes on Indian reservations, ruled that PIA—"enough water . . . to irrigate all the practicably irrigable acreage"—was "the *only* feasible and fair way by which reserved water for the reservations can be measured." *Id.* at 600, 601 (emphasis added). The alleged conflicts among the lower courts on the PIA standard simply do not exist. Moreover, as the Wyoming courts correctly recognized, the PIA standard—a standard for quantifying the reserved water rights for Indian reservations for agricultural purposes—is fully consistent with this Court's decisions after *Arizona I* quantifying reserved water rights for federal enclaves created for non-agricultural purposes.

The State's effort here to modify the PIA standard would call into question twenty-five years of litigation and settlements throughout the West that have been based on this Court's ruling in *Arizona I* that PIA is "the only feasible and fair way" to quantify Indian reserved water rights for agricultural purposes. This Court has repeatedly admonished Indian tribes for failing to respect "the compelling need for certainty" in Western water-rights adjudications. *Arizona v. California*, 460 U.S. 605, 620 (1983) ("*Arizona II*"); *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983). These concerns apply with equal force to the State's arguments here. Thus review should be denied.

I. Wyoming and Riverton Are Wrong in Contending that They Have Suffered an Injustice at the Hands of Their Own State Courts.

Wyoming and Riverton labor mightily to create the impression that they have been forced to bear a series of inequities inflicted by their own state courts. This suggestion is sufficiently implausible that perhaps no response is needed. Nevertheless, in light of the fact that Wyoming and Riverton devote so much space to this proposition,

the following points are in order before turning to the specific questions presented.

First, contrary to the suggestion of Wyoming and Riverton that their arguments were not given due consideration below, the legal arguments advanced by Wyoming and Riverton were carefully considered by the Wyoming courts in decisions that span over 700 pages of the Petitioner's Appendix in No. 88-309. The Wyoming courts also painstakingly analyzed the testimony and documentary evidence submitted by all parties, including Wyoming and Riverton, and entered extensive findings of fact. Pet. App. at 635a-90a, 243a-62a, 169a. Rather than relying here on those findings of fact, Wyoming and Riverton instead cite repeatedly to their own trial exhibits, *e.g.*, Pet. at 4-7, 13 n.12; Cross-Petition in No. 88-553 ("Cross-Pet.") at 3-5, 6 n.5, making the same arguments here that were considered and consistently rejected by the Wyoming courts.

Second, contrary to the impression that Wyoming and Riverton seek to create that the rulings below were adverse only to them, the Wyoming courts ruled against the Tribes and the United States on a number of significant issues, several of which are set forth in the Tribes' conditional cross-petition in No. 88-492. Indeed, the Wyoming courts ruled for the Tribes only on the most well settled of Indian water rights, namely, water rights reserved for agricultural purposes quantified under the PIA standard. Moreover, in applying the PIA standard, the Wyoming courts rejected some 50,000 of the approximately 150,000 acres that the Tribes and United States had originally proposed as practicably irrigable acreage. Pet. App. at 72a.

Third, Riverton is simply wrong in asserting that "application of the reserved right doctrine *at this late date* on the Reservation applies *a new rule* . . . for the establishment of water rights on the Reservation." Cross-Pet. at 28-29 (emphasis added). The United States began formally to assert reserved water rights on behalf of the

Tribes after this Court's *Winters* ruling in 1908, Pet. App. at 30a, and by 1916, the federal district court in Wyoming had enjoined the State Water Commissioner from interfering with the water rights of individual Indians on the Reservation.[5] Indeed, by 1926, the federal district court had specifically recognized the existence of reserved water rights under the 1868 Treaty, *United States v. Parkins*, 18 F.2d 642, 643 (D.Wyo. 1926),[6] a ruling that Wyoming and Riverton neglect to mention to this Court. In short, Wyoming and Riverton—not the Tribes or the United States—are seeking to rewrite history in this proceeding,

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[5] United States v. Hampleman, No. 742 (U.S.D.C. Wyo. June 25, 1916) (ruling that the water rights of the Indians "are within the absolute and exclusive jurisdiction" of the United States) (unpublished order reproduced herein as Exhibit A).

[6] In *Parkins*, the federal district court held that the 1868 Treaty "like all other treaties with the Indians creating reservations, contemplates the use and benefit of the lands within the reservation to its wards, the Indians, which likewise includes the irrigation of those lands, they being arid in character." 18 F.2d at 643 (citing Winters v. United States, 207 U.S. 564 (1908)).

Similarly, in Merrill v. Bishop, 287 P.2d 620 (Wyo. 1955), which involved a dispute over the water rights of non-Indians who had acquired allotted lands on the Reservation, the Supreme Court of Wyoming acknowledged that:

> It must, of course, be admitted that according to the holding in Winters v. United States, . . . , the water rights appurtenant to the Indian Reservation here in question were reserved to the Indians by the treaty of 1868.

Id. at 623 (citation omitted). The *Merrill* court then raised but did not decide the question whether the rights reserved under the Treaty had later been abrogated by Congress when it admitted Wyoming into the Union. *Id.* at 623-26. This Court had rejected this type of abrogation argument before *Merrill*, *see* Winters, 207 U.S. at 597-98, and has done so consistently since *Merrill*, *see* United States v. District Court In and For the County of Eagle, 401 U.S. 520, 522-23 (1971); Arizona I, 373 U.S. 596-98. Accordingly, the Wyoming courts correctly rejected the argument in this proceeding, Pet. App. at 26a-28a, 31a-32a, and the State has not sought review of this question.

for reserved water rights under the Treaty have been judicially recognized for over sixty years.

Fourth, Riverton is wrong in asserting that this case gives rise to the concern expressed in *United States v. New Mexico*, 438 U.S. 696, 705 (1978), that reserved water rights may "require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." Because of the abundant run-off from the Wind River Mountains, the Reservation is "the best-watered portion of Wyoming." *United States v. Shoshone Tribe*, 304 U.S. at 114. Accordingly, when the Bureau of Indian Affairs honored the Tribes' reserved rights on the Reservation during the drought of this past summer, it resulted in virtually no water loss to non-Indian irrigators.[7]

Riverton is simply misrepresenting the record in asserting that "[t]his is a case in which the findings below demonstrate that there will be a gallon for gallon reduction in water available to state and private water users as a result of the quantification of a Federal reserved water right." Cross-Pet. at 18. There was never any such finding in this proceeding, and the Supreme Court of Wyoming expressly held that there is "no indication" that the use by the Tribes of their reserved water would cause a "gallon for gallon reduction in the water available for other uses." Pet. App. at 71a. Moreover, the state district court

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[7] As Riverton notes, there was a dispute this past summer regarding a water shortage on one irrigation project on the Reservation. Cross-Pet. at 8 n.9. What Riverton fails to note, however, is that the Tribes and the State, working together under an agreement signed by the Governor and the Chairmen of the Business Councils of the Tribes, determined that the shortage in question was "*not* the result of an actual shortage of water supply, but rather [was] the result of problems with management of the water supply and of the need for structural improvement in the irrigation and delivery system." Agreement at 1 (emphasis added) (reproduced as Exhibit B, page 3a *infra*). The dispute was then settled to the satisfaction of the Tribes and the State after certain water management changes were implemented to ensure that all water users would receive their full legal entitlement.

specifically deleted its only finding that the quantification would have *any* adverse effect on other water users.[8]

Fifth, in their repeated assertions that the Wyoming courts quantified an excessive amount of water in light of the current irrigation needs of the Tribes, Wyoming and Riverton miss the whole point of Indian reserved water rights. The essence of such rights is that they "vest[]" and become "effective" when an Indian reservation is created in an amount necessary "to satisfy the *future* as well as the present needs" of the reservation. *Arizona I*, 373 U.S. at 600 (emphasis added). In so defining these rights, this Court correctly recognized that Indian reservations throughout the West would be largely worthless if the Indians were left to compete with non-Indians for water under the state-law doctrine of prior appropriation.[9] There are compelling historical reasons why the Indians would invariably have lost the race to the stream under the doc-

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[8] Riverton's assertion regarding a "gallon-for-gallon reduction" is apparently based on the district court's original Finding of Fact Number 98, Pet. App. at 258a, but, as even Riverton must acknowledge, Cross-Pet. at 14-15 n.17, the district court later deleted that finding. Pet. App. at 169a. In any event, the original Finding of Fact Number 98 simply stated that "the construction of any one or all of the [Tribes'] future [irrigation] projects would have *an adverse effect* on other water users," *id.* at 258a (emphasis added), not that the use of water for these projects would result in a "gallon-for-gallon reduction" for other water users.

Similarly, the Special Master did not find that there would be a "gallon-for-gallon reduction." He simply found that full use by the Tribes of their reserved water rights "may have an adverse effect on many appropriators." Pet. App. at 630a. The Special Master did not purport to quantify this effect, *see id.* at 632a-34a, and, in any event, the district court deleted its only finding of adverse effect.

[9] "Under the doctrine of prior appropriation, the first to divert and use water beneficially establishes a right to its continued use as long as the water is beneficially diverted." Cappaert v. United States, 426 U.S. 128, 139-40 n.5 (1976).

trine of prior appropriation,[10] and why, even today, many Indian reservations, such as the Wind River Reservation, have yet to achieve full agricultural development.[11]

Sixth, Wyoming's fanciful assertion here that there has been "full irrigation development" on this Reservation, Pet. at 23-26, is completely without support in the record and is contradicted by the findings of the Wyoming courts that there are large unfarmed tracts of practicably irrigable acreage on the Reservation. Pet. App. at 532a-580a; 229a-230a.

Finally, the equitable arguments advanced here by Wyoming and Riverton not only are overblown,[12] but also are

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[10] "The Indians were not an agricultural people and it was necessary for them to develop their agricultural skills after settling on the Reservations. . . . [I]f they were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun." Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original, at 261 (Dec. 5, 1960). Indeed, as the Wyoming courts noted, the first few decades of agricultural development on the Wind River Reservation, notwithstanding its ample waters and fertile lands, were a complete failure, causing the Indians to have to sell a portion of their land to raise cash to support themselves. Pet. App. at 10a.

[11] Indian farmers were hampered in their later efforts to catch up in the race to the stream by the fact that "[i]rrigation systems and other water resource projects often require substantial investments, and Congress has tended to give a higher priority to projects that benefit non-Indians." F. Cohen, Handbook of Federal Indian Law 598 (1982). This has certainly been true on the Wind River Reservation, as illustrated by the Riverton Reclamation Project. As a result of these funding disparities, many Indian reservations, including Wind River, have not as yet achieved full agricultural development.

[12] As previously noted, reserved water rights under the 1868 Treaty have been judicially recognized for over sixty years, and the state district court specifically deleted its only finding that the quantification of the Tribes' water rights in this proceeding would have *any* adverse

outweighed by those favoring the Tribes. The events culminating in the 1868 Treaty and the terms of the Treaty itself lend compelling support to the conclusion that, at the very least, the Treaty reserved an amount of water sufficient to irrigate the practicably irrigable acreage on the Reservation.[13] *See supra* pages 1-2. Moreover, the United States and the Tribes entered into the 1868 Treaty before Wyoming was even a Territory and more than thirty-five years before the passage of the 1905 Act upon which the equitable arguments of Wyoming and Riverton are based. In addition, the water quantified under the PIA standard is now desperately needed to improve the Reservation economy, where the unemployment rate among Indians exceeds 70 per cent. *See infra* note 37. In short, the equities weigh decidedly in favor of the Tribes.

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effect on other water users.

It should also be noted that the relief sought by the State in its complaint commencing this adjudication was only a quantification of all water rights in this region of Wyoming. As the State received the relief it prayed for, further review at its request is inappropriate. *Cf.* Public Service Comm'n v. Brashear Freight Lines, Inc., 306 U.S. 204, 206 (1939).

[13] As this Court has previously ruled, the terms of this Treaty "are to be construed in the sense in which naturally the Indians would understand them." United States v. Shoshone Tribe, 304 U.S. at 116. In light of the terms of the Treaty and its history, there can be no doubt that when the Shoshones entered into the Treaty, they "naturally . . . would [have] under[stood]" that, at the very least, the Tribe would be permitted to use all the water necessary to accomplish the agricultural objectives of the Reservation.

II. The Questions Presented by Wyoming and Riverton Were Correctly Resolved by the Wyoming Courts and Do Not Warrant Review.

A. Water Rights Were Impliedly Reserved Under the 1868 Treaty, and Those Rights Were Not Abrogated or Superseded by the Water Proviso to the 1905 Act.

1. *Winters* and *Arizona I*

The Wyoming courts correctly held that water rights were impliedly reserved when the Reservation was established pursuant to the 1868 Treaty. Pet. App. at 431a-39a, 210-13a, 26a-32a. As the Wyoming courts recognized, this case is controlled by *Winters* and *Arizona I*. This Court held that, when each of the six Indian reservations at issue in those decisions was established, water was impliedly reserved to satisfy the purposes of the reservation.

In *Winters*, the Court found this intent implicit in the circumstances surrounding the creation of the Fort Belknap Indian Reservation and the 1888 Agreement pursuant to which it was created. As the Court noted, the purpose of the 1888 Agreement was to assist the Indians in "chang[ing] [their] habits" from that of a "nomadic and uncivilized people" to that of "a pastoral and civilized people." 207 U.S. at 576. The Court further noted that a reservation of water was essential to accomplish that purpose because the lands on the Fort Belknap Reservation "were arid and, without irrigation, were practically valueless." *Id.* In those circumstances, and in light of the fact that the Indians had ceded "a very much larger tract" in return for these lands, the Court concluded that water rights had been impliedly reserved for the Indians under the 1888 Agreement. *Id.*

Similarly, in *Arizona I*, this Court, noting that "[m]ost of the land in these [five Indian] reservations is and always has been arid," held that water for agriculture had been

impliedly reserved when the reservations were established, because the United States "intended to deal fairly with the Indians by reserving for them waters without which their lands would have been useless." 373 U.S. at 598, 600. In short, an intent to reserve water "is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert v. United States*, 426 U.S. 128, 138 (1976) ("*Cappaert*"), citing *Winters* and *Arizona I*.

Winters and *Arizona I* have been cited with approval by this Court in every federal and Indian reserved water rights case since they were decided.[14] Moreover, the lower courts have repeatedly followed *Winters* and *Arizona I* in finding an intent to reserve water on other Indian reservations.[15]

The Wyoming courts correctly held that this case was indistinguishable from *Winters* and *Arizona I*. As was true of the Indian reservations in those cases, one of the purposes of the Wind River Indian Reservation—indeed, according to the Supreme Court of Wyoming, its "sole . . . purpose"—was to encourage the previously nomadic In-

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[14] United States v. District Court In and For the County of Eagle, 401 U.S. 520, 522-23 (1971); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976); Cappaert v. United States, 426 U.S. 128, 139 (1976); United States v. New Mexico, 438 U.S. 696, 700 n.4 (1978); Arizona v. California, 460 U.S. 605, 616 (1983); Nevada v. United States, 463 U.S. 110, 116 n.1 (1983); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 550 n.2 (1983).

[15] *E.g.*, Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908); Skeem v. United States, 273 F. 93 (9th Cir. 1921); United States v. Hibner, 27 F.2d 909, 911 (D. Idaho 1928); United States v. Parkins, 18 F.2d 642, 643 (D. Wyo. 1926); United States v. McIntire, 101 F.2d 650 (9th Cir. 1939); United States v. Powers, 94 F.2d 783, 785 (9th Cir. 1938), *aff'd*, 305 U.S. 527 (1939); and United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956).

dians to develop an agrarian economy.[16] Pet. App. at 38a, 216a-22a. Moreover, as was true of the reservations in *Winters* and *Arizona I*, this agricultural objective simply could not be accomplished on the Reservation without water, for, as the district court specifically found:

> Much of the reservation land was arid. The water was needed for irrigation and was essential to the raising of crops. Without water most of the land would have been useless.

Pet. App. at 211a. In these circumstances, the Wyoming courts correctly held that water rights were impliedly reserved under the 1868 Treaty; indeed, as the Special Master noted, "[a]ny other conclusion would appear to be contrived, and contrary to Supreme Court precedent."[17] Pet. App. at 434a.

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[16] In addition, as was true of the Indians in *Winters*, the Shoshones agreed under the 1868 Treaty to cede their rights to a vast tract of land (44,672,000 acres) in return for a permanent home on a much smaller tract (3,054,182 acres) on which they were to pursue a new way of life. United States v. Shoshone Tribe, 304 U.S. at 113.

The Tribes agree that one of the purposes of the Reservation was to encourage the Indians to develop an agricultural economy, but disagree with the holding of the Supreme Court of Wyoming that the Reservation had a *sole* agricultural purpose. *See* Tribes' Cross-Petition in No. 88-492 at 11-18.

[17] The State asserted below that "[t]he Reservation was in essence a gift to [Shoshone Chief] Washakie for his assistance to the United States in the years preceding 1868" and that the Shoshones were to relocate on the Reservation "to begin a new life as farmers." Brief of Appellee State of Wyoming in Response to the Appellants' Briefs of the United States and Tribes (Type 2 Claims) 64, 65 (Feb. 24, 1986). Thus, in disputing the existence of reserved water rights under the 1868 Treaty, the State is asserting that the Reservation was a "gift" to the Shoshones on which they were to become farmers, but that the gift came without water, even though, as the district court found, "[w]ithout water most of the land would have been useless." Pet. App. at 211a. In *Winters* and *Arizona I*, this Court specifically rejected the same argument, namely, that "Congress had created an Indian Reser-

2. The Water Proviso to the 1905 Act

The State asserts that the "water proviso" to the 1905 Act was a decision by Congress to defer to Wyoming law for the acquisition of all water rights for the Wind River Indian Reservation. Pet. at 12-18. The State's argument here is the culmination of its dogged but meritless effort throughout this proceeding to create, for the Wind River Reservation, an isolated exception to *Winters* and its progeny.

Under the water proviso, a portion of the proceeds to the Indians from the sale of their land under the 1905 Act—if "any balance" remained after other specified payments—was to be "devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in *securing* water rights from said State." Pet. App. at 772a (emphasis added). The proceeds earmarked by the proviso were then used, as the proviso directed, for the purpose of "securing" the water rights of the Indians from challenge by Wyoming. *Id.* at 30a.

Wyoming raises two arguments based on the water proviso. The State first argues that the existence of reserved water rights under the 1868 Treaty "is contrary to the intent of Congress" in enacting the water proviso to the 1905 Act. Pet. at 12, 13-16. But, as the Special Master noted in a related context, this argument "wholly lacks any chronological perspective." Pet. App. at 437a. The source of the reserved water rights for the Reservation is the 1868 Treaty, and Wyoming's argument "fails to address the question of what was the Congressional intent in 1868, the date of the treaty," *id.*, much less the intent of the Indians at that time. The Wyoming courts thus correctly recognized that the intent of Congress in 1905 is irrelevant to the question presented here, namely,

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vation without intending to reserve waters necessary to make the reservation livable." Arizona I, 373 U.S. at 599; Winters, 207 U.S. at 576.

whether water rights were reserved under the 1868 Treaty ratified by the Senate almost forty years before the 1905 Act.[18]

Moreover, even if the intent of Congress nearly four decades later were somehow relevant, the Wyoming courts correctly ruled that the existence of reserved water rights under the 1868 Treaty "is not inconsistent with the [water proviso to the] pre-Winters 1905 Act." *Id.* at 29a. The purpose of the water proviso was not, as the State urges, to subject the water rights of the Indians to exclusive state jurisdiction. Rather, as the only historian who testified on this point concluded, the proviso was an attempt on the part of the United States "to cover as many bases as it could" to protect the Indians in the face of legal uncertainty regarding their treaty rights prior to this Court's definitive 1908 ruling in *Winters*.[19] Iverson Tr. 543. Under the proviso, a portion of the Indians' own proceeds from land sales under the 1905 Act were earmarked for "securing" their water rights from challenge by Wyoming in the event that the courts might later determine that com-

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[18] One of the most important attributes of Indian reserved water rights is that they "vest[]" and become "effective" when an Indian reservation is created. Arizona I, 373 U.S. at 600. *Accord*, Cappaert, 426 U.S. at 138-40 & n.5. The reserved water rights for the Wind River Reservation are, therefore, property rights that either were or were not established in 1868. By their very nature, the initial existence of these water rights depends upon what took place in 1868, not on what happened in 1905.

[19] The water proviso was a prudent response to two pressing considerations in 1905: (1) the non-Indians who would be entering the Reservation under the 1905 Act would immediately begin the race to the stream under the doctrine of prior appropriation, and (2) this race was to begin when there was necessarily "some uncertainty in the status of Indian water rights" before this Court's 1908 ruling in *Winters*. Pet. App. at 28a. If the courts later determined that there were in fact no reserved water rights under the 1868 Treaty, and the Indians had not "secur[ed]" their water rights from challenge by Wyoming, the Indians would have lost the race before it began.

pliance with state law was required. Accordingly, as the Supreme Court of Wyoming correctly held, the state water rights "secur[ed]" for the Indians with the proceeds earmarked by the proviso were acquired not in lieu of their reserved water rights under the 1868 Treaty, but rather as a pre-*Winters* precaution to safeguard their right to water. Pet. App. at 28a-31a.

This interpretation of the water proviso, as the Wyoming courts recognized, is supported by the express terms,[20] legislative history[21] and contemporaneous admin-

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[20] The State errs in asserting that the water proviso to the 1905 Act "expressly requires the acquisition of [the] reservation's water rights under state law." Pet. at 12. The water proviso did not *require* the acquisition of anything; it simply governed how a portion of the proceeds from the 1905 Act land sales were to be spent if there was "any balance" remaining after other specified payments were made. Indeed, if there had not been "any balance" remaining, the proviso would have had no force whatever. As it happened, there was a remaining balance. But, once those remaining proceeds were spent, the proviso, by its express terms, had served its only purpose and imposed no further requirements on the Tribes or the United States. The water proviso thus falls far short of an express congressional requirement that all water rights for the Reservation be acquired under state law.

The express terms of the proviso reveal that its purpose was to assist the Indians in "securing [their] water rights from said state." The use of the word "securing" in the proviso is consistent with the legislative history and contemporaneous administrative interpretation of the proviso that reveal that it was intended as a pre-*Winters* measure to "secur[e]" or protect the water rights of the Indians from challenge by the State in the event that the courts might later determine that compliance with state law was required.

[21] As the Supreme Court of Wyoming noted, the water proviso was enacted partially in response to concerns of the Indians who, prior to *Winters* and on the eve of opening a large portion of the Reservation to non-Indians under the 1905 Act, were understandably "eager to secure their water rights." Pet. App. at 28a. In response to these concerns, the Government's negotiator, referring to the proceeds that were to be earmarked under the proviso, advised the Indians that "[i]t would be well to use this surplus in securing your water rights so that

istrative interpretation of the proviso.[22] The State submitted 348 so-called "intent and purposes" exhibits in an effort to show "a conscious, deliberate attitude on the part of Congress that if the Indians were to expect any water, they must rely on and comply with the system of appropriation established by state law." Pet. App. at 436a-37a. But the Special Master, in a ruling affirmed by the district court and the Wyoming Supreme Court, concluded that "[w]hile lengthy, bulky, and large in number, the exhibits . . . lack the qualitative content necessary to support the

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the whiteman cannot deprive you of water with which to irrigate your lands." Minutes of Council, Shoshone Agency, Wyoming, April 19, 1904; Plaintiff's Exhibit WRIR-8. Thus, as the Supreme Court of Wyoming held, the Indians "understood that the agreement would make their water rights firm." Pet. App. at 29a. Wyoming seeks to turn the proviso on its head by asserting that this prudence on the part of the Indians in agreeing to earmark a portion of their *own* proceeds from 1905 Act land sales should be construed as a "fulfill[ment]" by Congress of the prior treaty rights of the Indians. Pet. at 15-16.

[22] As the Supreme Court of Wyoming recognized, there was "some uncertainty" on the part of federal officials prior to *Winters* regarding the legal status of reserved rights on the Reservation. Pet. App. at 28a. But the United States began asserting such rights after *Winters*, while initially also continuing to pursue state water rights. *Id.* at 30a. Shortly thereafter, what Wyoming characterizes as the "extensive cooperation between the Indian Service and the Wyoming State Engineer" in the "[d]evelopment of Indian irrigation projects on the Reservation," Pet. at 5, became far less extensive and far less cooperative. In 1910, as the Supreme Court of Wyoming noted, the United States "refused to apply to the State for an extension of time in which to complete the irrigation project authorized by the 1905 Act." Pet. App. at 30a. In 1911, a dispute arose when State "Water Commissioner Hampleman first closed the headgates on an allottee's ditches claiming that [the Shoshone farmer] had no valid state permit." *Id.* As a result of this dispute, the United States filed suit asserting reserved water rights under the 1868 Treaty, and obtained an injunction against the Water Commissioner. United States v. Hampleman, *supra*; Pet. App. at 30a. In 1926, the United States again filed suit asserting reserved water rights under the 1868 Treaty, and the federal district court explicitly recognized the existence of such rights. United States v. Parkins, *supra*.

State's argument." *Id.* at 437a. The Supreme Court of Wyoming specifically held that "[a] reservation of water with an 1868 priority date is not inconsistent with the [state] permit provisions of the pre-Winters 1905 Act."[23] *Id.* at 29a.

The Wyoming courts also correctly rejected Wyoming's second argument based on the proviso—that even if there were reserved water rights under 1868 Treaty, those rights were "terminated by the express language of the water proviso."[24] Pet. at 16-17. The express language of the prov-

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[23] There is no merit to the assertions of Wyoming and Riverton that their state courts "failed to assign any meaning or purpose to the water proviso," "elected to write [it] into oblivion," or improperly relegated it to "the dustbin of history." Pet. at 17, 18; Cross-Pet. at 11. Wyoming and Riverton simply object to the fact that their interpretation of the proviso was rejected by the Wyoming courts.

[24] In arguing that any preexisting treaty rights were terminated, Wyoming also chides the Supreme Court of Wyoming for "fail[ing] even to address the fact that Congress carefully considered and refused to enact a limited reserved water right [on the Reservation in connection with the 1905 Act and a 1914 appropriations act.]" Pet. at 17, 12. But the Wyoming Supreme Court specifically addressed these legislative proposals and concluded that their rejection was "no indication that there was no intent to reserve water." Pet. App. at 31a, 29a. In any event, the fact that Congress did not enact *affirmative* legislation regarding reserved water rights in 1905 or 1914 has no bearing whatsoever on whether Congress intended to *abrogate* a preexisting right under the 1868 Treaty.

The State emphasizes that, in connection with the 1914 proposal, the Assistant Commissioner of Indian Affairs had testified that "the water proviso [to the 1905 Act] had 'practically nullified' Federal reserved water rights under *Winters*." Pet. at 13. The State fails to note, however, that the Assistant Commissioner also testified that he supported the 1914 proposal that would have expressly recognized certain reserved water rights because "otherwise the Indians *stand a chance* of losing their water rights *or else taking their water rights status to the court* for determination." Hearings before the Subcommittee of the Committee on Indian Affairs, Indian Appropriations Bill 379 (1914), Wyo. Exh. WRIR I&P-15 (emphasis added). At most, the testimony

iso does not purport to terminate any rights under the 1868 Treaty, *see supra* note 20, and the 1905 Act contains a savings clause expressly protecting the preexisting treaty rights of the Indians against infringement by implication.[25] Pet. App. at 774a. Moreover, as the Supreme Court of Wyoming noted, Congress clearly "knew how to express a relinquishment of reserved water rights," *id.* at 30a, because it had done so explicitly in an agreement only ten years earlier with the Tribes in connection with the 1896 cession. First McLaughlin Agreement, 30 Stat. 62, 94 (ceding 55,000 acres "*and the water rights appertaining thereunto*") (emphasis added). In short, as the Wyoming courts correctly held, the water proviso falls far short of this Court's exacting requirements for finding a termination of Indian treaty rights.[26] Pet. App. at 30a.

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reveals that, in 1914, the Assistant Commissioner thought the Indians might "stand a chance" of losing water rights unless they went to court. Subsequently, of course, the government did go to court and established the water rights of the Tribes under the 1868 Treaty. United States v. Hampleman, *supra*; United States v. Parkins, *supra*.

[25] The savings clause of the 1905 Act provides:

> It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreement, not inconsistent with the provisions of this agreement.

1905 Act at art. 10; Pet. App. at 774a.

[26] *E.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (" 'Absent explicit statutory language,' . . . this Court . . . has refused to find that Congress has abrogated Indian treaty rights.") (citation omitted); F. Cohen, Handbook of Federal Indian Law 223 (1982) (the applicable standard is whether "Congress [has] show[n] a 'clear and plain' intention to abrogate Indian treaty rights").

There is no inconsistency between the rulings below and United States v. Dion, 476 U.S. 734 (1986), cited here by Wyoming, Pet. at 17, for the State has not provided "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that

In sum, Wyoming's argument regarding the water proviso was rejected, and correctly so, at every level of the Wyoming state court system. Moreover, the argument applies only to the Wind River Reservation because it turns on the unique statutory language, legislative history, and administrative interpretation of the water proviso, as underscored by the State's reliance below on 348 "intent and purposes" exhibits.[27] Accordingly, review is not warranted.

B. The Wyoming Courts Were Correct in Applying the PIA Standard To Quantify the Water Rights Reserved Under the Treaty for the Agricultural Purposes of the Reservation.

Review of the PIA issue is unwarranted. Wyoming is simply wrong in asserting that this Court has not resolved "[t]he appropriate quantification standard for reserved

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conflict by abrogating the treaty." 476 U.S. at 740. The State's reliance upon the legal standards set forth in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), Pet. at 17, is also misplaced. Those standards, as more recently summarized in Solem v. Bartlett, 465 U.S. 463, 469-72 (1984), govern the issue whether—for purposes of determining the scope of state criminal, civil, or regulatory jurisdiction—a portion of an Indian reservation opened for non-Indian settlement has been disestablished from the original reservation. *See infra* pages 34-37. By contrast, the thrust of Wyoming's argument is that the water proviso abrogated the preexisting reserved water rights for the *entire* Reservation. This claim is subject to the exacting requirements of this Court for finding an abrogation of Indian treaty rights. County of Oneida, 470 U.S. at 247; Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979).

[27] Even by Wyoming's own count, the issue is relevant to at most three other Indian reservations, Pet. at 12 n.10, and, on one of the three, the Fort Peck Indian Reservation, the State of Montana and the Assiniboine and Sioux Tribes have already reached a settlement under which those Tribes will have reserved rights to more than twice the amount of water quantified for the Shoshone and Northern Arapaho Tribes by the Wyoming courts. Mont. Code Ann. § 85-20-201 (1987). In any event, the terms of the statutes relating to those other Indian reservations are all quite different from the water proviso to the 1905 Act.

water rights of an agricultural Indian reservation." Pet. at 18. In *Arizona I*, this Court, in quantifying the reserved water rights for five agricultural Indian reservations, addressed this very issue and held that PIA—"enough water . . . to irrigate all the practicably irrigable acreage"—was "the only feasible and fair way by which reserved water for the reservations can be measured." 373 U.S. at 600, 601. As the Wyoming courts correctly held, the PIA standard remains good law. Pet. App. at 47a, 228a-29a, 532a.

In *Arizona I*, with respect to the issue of quantification, the Court first ruled that, when the five Indian reservations were established, water was reserved "to satisfy the *future* as well as the present needs of the Indian Reservations." 373 U.S. at 600 (emphasis added). In so ruling, the Court affirmed the decision of the Special Master, who had rejected the argument that the amount of reserved water was limited to the actual needs of the Indians when their reservations were established.[28] Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original, at 260-61 (Dec. 5, 1960) ("Special Master's Report").

The Court in *Arizona I* next addressed the more difficult question of how to measure the reserved rights for the Indian reservations in a manner that would allow, as later described in *Arizona II*, "a fixed present determination of

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[28] In rejecting this argument, the Special Master noted:

> Certainly the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time each Reservation was created. It is unreasonable to attribute to the United States an intention or an expectation that the Indians would remain stagnant or die out when they were settled on a Reservation. Since the Indians could remain on these Reservations and develop their society and economy only if water from the Colorado River was available to meet their future needs, I have found that the United States, when it reserved water, reserved it for all of such needs.

Special Master's Report at 260-61.

future needs for water." *Arizona II*, 460 U.S. at 623 (emphasis and footnote omitted). Arizona argued that the quantity of water reserved should be measured by the "reasonably foreseeable needs" of the Indians, which, as this Court noted, "in fact, means by the number of Indians." *Arizona I*, 373 U.S. at 600-01. The Special Master had rejected Arizona's population-based quantification standard, for he concluded that it would not yield a fixed present determination that adequately measured the future water needs on the Indian reservations.[29] This Court agreed, noting that "[h]ow many Indians there will be and what their future needs will be can only be guessed." *Id.* at 601.[30]

This Court then adopted the Special Master's recommendation that the amount of water reserved for the agricultural Indian reservations be measured not by Indian population, but rather by the amount of practicably irrigable acreage on the reservations. *Id.* at 600-01. As the Special Master had concluded, the PIA standard "will pre-

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[29] The Special Master rejected a population-based quantification standard for three reasons. First, a standard based solely on the water needs of the present Indian population "would defeat the basic purpose of reserving water to meet future requirements." Special Master's Report at 263. Second, an open-ended standard based on the needs of the present Indian population, but subject to adjustment as the Indian population increased, would provide neither the Indians nor the non-Indians with the requisite certainty of water availability to make long-term investment decisions regarding the development of their land. *Id.* at 264. Finally, a standard based on a present projection of future Indian population growth and water needs was rejected because of "the difficulty of predicting the future needs of Indian Reservations" and the risk that failing properly to foresee those needs "would result in a forfeiture of the Indians' water rights and would stultify development of the Reservations." *Id.* at 264.

[30] The Court also rejected Arizona's argument that the judicial doctrine of equitable apportionment, a method of resolving water disputes between States, should be used in quantifying the reserved water rights of the Indians. 373 U.S. at 596-97.

serve the full extent of the water rights created by the United States and will establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users."[31] This Court agreed, concluding that the PIA standard was "the only feasible and fair way" to quantify reserved water rights for agricultural Indian reservations, 373 U.S. at 601, for, as this Court later summarized in *Arizona II*, "the irrigable-acreage standard allowed a present water allocation that would be appropriate for *future* water needs." 460 U.S. at 617 (emphasis added).

The PIA ruling in *Arizona I* was "hotly contested by the States, who argued that [the PIA standard was] a much too liberal measure." *Id.* Since then, the States have twice sought to overrule *Arizona I*, but this Court has rebuffed both attempts. *Cappaert*, 426 U.S. at 139 n.4; *Arizona II*, 460 U.S. at 625-26.

Wyoming again seeks to challenge the PIA standard, asserting here that it is at odds with a "rapidly evolving necessity standard" said to be evident in certain decisions of this Court since *Arizona I*.[32] Pet. at 23, 19-22. But each

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[31] Special Master's Report at 265. As the Special Master noted, the PIA standard was also consistent with the intent of the United States in establishing the Indian reservations because "the land originally withdrawn for each of the five Indian Reservations was considerably more extensive than was necessary to support the Indians who inhabited the Reservations immediately after their establishment." *Id.* at 262. According to the Special Master, "[t]he only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future. It must have been apparent that unless the United States reserved water for the land at the time of withdrawal, there might be no water left to appropriate at the time that the land was needed for the purposes for which it was withdrawn." *Id.* at 262-63.

[32] Wyoming also seeks to distinguish this case from *Arizona I* on the ground that the Indian reservations in that case "had been set aside for the future requirements of unknown tribes." Pet. at 19. But this

of the decisions that Wyoming argues has eroded the vitality of *Arizona I* in fact followed that decision and cited it with approval.[33]

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point was not even mentioned in this Court's decision in *Arizona I*, and the portion of the Special Master's Report in *Arizona I* cited by Wyoming states only that "in *some* instances it was not clear *which* Indian tribes would ultimately be settled on a particular Reservation." Special Master's Report at 262 (emphasis added). In any event, at the time the Wind River Indian Reservation was established, it was not known that the Northern Arapahos would also be settling on the Reservation and making demands upon its water supply. *See* Shoshone Tribe v. United States, 299 U.S. at 486-92.

[33] Two of the cases cited by Wyoming, Cappaert v. United States, 426 U.S. 128 (1976), and United States v. New Mexico, 438 U.S. 696 (1978), involved the quantification of reserved water rights on non-agricultural federal enclaves. In each instance, the Court cited with approval to *Arizona I* for the proposition that reserved water rights are measured by "that amount of water necessary to fulfill the purpose of the reservation, no more." Cappaert, 426 U.S. at 141; United States v. New Mexico, 438 U.S. at 700. There was no express or implied criticism of the PIA standard. Indeed, *Arizona I* is cited as supporting and being fully consistent with the result reached in both decisions.

Wyoming is correct in suggesting that there were lesser awards in these decisions than in *Arizona I*. The reason for this is not that *Arizona I* is no longer good law, but rather that the policy considerations involved in the quantification of reserved water rights on federal enclaves are different from, and favor lesser awards than, those in cases quantifying reserved water rights for Indian reservations. *See infra* note 49; F. Cohen, Handbook of Federal Indian Law 581-85 (1982).

The third case on which the State relies, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) ("*Fishing Vessel*"), involved an apportionment of off-reservation fish between Indians and non-Indians. The Court in *Fishing Vessel* cited *Arizona I* and *Winters* as examples of prior court-ordered apportionments of natural resources between Indians and non-Indians "that assured that the Indians' reasonable livelihood needs would be met." 443 U.S. at 685-86. Again, there was no express or implied criticism of the PIA standard.

The final case cited by Wyoming, *Arizona II*, was an attempt by

Moreover, Wyoming is simply wrong in suggesting that the PIA standard in *Arizona I* is divorced from "any concepts of necessity."[34] Pet. at 21. The Court in *Arizona I*, noting that "water from the river would be essential to the life of the Indian people . . . and the crops they raised," specifically adopted the PIA standard as a means of quantifying reserved water for "the future as well as the present *needs* of the Indian reservations." 373 U.S. at 599, 600 (emphasis added). Similarly, as this Court noted in

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the Indian tribes involved in *Arizona I* to reopen the decree because they claimed that certain practicably irrigable lands had been omitted from the claims presented by the United States on their behalf in *Arizona I*. This Court held that the tribes were not permitted to relitigate this issue, in light of the "compelling need for certainty" and "the strong interest in finality" in Western water-rights adjudications. Arizona II, 460 U.S. at 620. In the passage cited by Wyoming, the Court was not casting doubt on the continuing vitality of *Arizona I*, but rather was explaining to the tribes that the need for finality applied with equal force to arguments that the States also desired to relitigate.

[34] Wyoming repeatedly asserts that the Wyoming courts erred in quantifying the reserved water rights of the Tribes "in the absence of any demonstrated necessity for the water." Pet. at 18, 21, 24. But the district court specifically found that "[w]ithout water, the reservation could never have accomplished it's [sic] prime purpose: the development of agriculture." Pet. App. at 211a. The district court further found that there are large unfarmed tracts of practicably irrigable acreage on the Reservation. *Id.* at 229a-30a, 258a. In these circumstances, the district court was correct in applying the PIA standard to quantify the water rights reserved under the Treaty for the agricultural purposes of the Reservation. *Id.* at 228a-29a.

The Wyoming courts also correctly held that, although the PIA standard is used to quantify the amount of water reserved by reference to the agricultural purposes of the Reservation, the Tribes are not limited to using this reserved water for farming, but rather may "make such use of the water covered by their reserved water rights as they deem advisable." Pet. App. at 183a, 194a. The State has not challenged this ruling. The only restrictions imposed by the Wyoming courts are that the Tribes may not increase their consumptive use of water and may not use the water off the Reservation. *Id.* at 183a. The Tribes are challenging the latter restriction in their conditional cross-petition in No. 88-492.

Arizona II, the PIA standard is "a measure [that] allow[s] a fixed present determination of future *needs* for water." 460 U.S. at 623 (emphasis omitted and added) (footnote omitted).

Wyoming is also wrong in asserting that there is "confusion" or "conflict[s]" among the lower courts regarding the PIA standard.[35] Pet. at 20-22; 23-26. The Supreme Court of Wyoming certainly was not confused; it reviewed all the cases cited here by Wyoming and concluded that PIA was the proper standard for quantifying the agricultural reserved water rights under the Treaty. Pet. App. 47a. Indeed, the Indian water-rights cases decided by the lower courts after *Cappaert* and *New Mexico* have uniformly followed the PIA standard set forth in *Arizona I*.[36]

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[35] The Ninth Circuit decisions said to be in conflict with the ruling of the Wyoming Supreme Court on the PIA issue, Pet. at 23-26, were both decided long before *Arizona I*, and the Ninth Circuit, citing to *Arizona I*, has recently observed that "the scope of Indian irrigation rights is well settled." United States v. Adair, 723 F.2d 1394, 1415 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). In any event, the Ninth Circuit decisions are not in conflict with the ruling below, and indeed the Special Master in *Arizona I* had specifically stated that the Ninth Circuit decisions relied upon here by Wyoming were entirely consistent with using the PIA standard. Special Master's Report at 261, 258-60.

Wyoming relies on White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614 (1987) as the single example of confusion among the lower courts. But the quoted passage from that case does not reveal any confusion, and, in any event, the Court of Claims acknowledged that "this is not a Winters doctrine case insofar as the Court of Claims lacks jurisdiction to adjudicate claims over plaintiff's reserved water rights in terms of future use." *Id.* at 626.

[36] United States v. Anderson, 736 F.2d 1358, 1361 (9th Cir. 1984), *affirming* 591 F. Supp. 1, 8-9 (E.D. Wash. 1982); United States v. Adair, 723 F.2d 1394, 1415-16 (9th Cir. 1983), *affirming* 478 F. Supp. 336 (D. Ore. 1979), *cert. denied*, 467 U.S. 1252 (1984); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981), *affirming* 460 F. Supp. 1320, 1329-31 (E.D. Wash. 1978), *cert. denied*, 454 U.S.

This Court was correct in *Arizona I* in holding that the PIA standard is "the only fair and feasible way" to measure Indian reserved water rights for agricultural purposes. Wyoming never explains why it believes this Court's original PIA ruling was wrong or what quantification standard it believes should be used in this context.[37] The thrust of Wyoming's argument appears to be that the Wyoming courts erred in quantifying an amount of reserved water in excess of "the Reservation's historical needs." Pet. at 26. But this argument was quite properly rejected in *Arizona I*,[38] and Wyoming has offered no persuasive reason

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1092 (1981); Montana v. Confederated Salish and Kootenai Tribes, 712 P.2d 754, 764 (Mont. 1985).

[37] In the proceedings below, Wyoming asserted that the PIA standard was too generous a measure of the reserved water rights under the Treaty, for, according to Wyoming, the Indians were only entitled to an amount of reserved water for their "minimal" or "moderate living" needs on the Reservation. Brief of Appellant State of Wyoming (Type 1 Claims) 51 (Dec. 5, 1985). But the State never proffered any evidence at all to support the assertion that the amount of reserved water quantified under the PIA standard exceeded the "minimal needs" or "moderate living" requirements of the Indians.

Nor was there any such evidence to proffer. The water quantified under the PIA standard is desperately needed to improve the economy on the Reservation, where, according to a governmental study released last month, the unemployment rate among Indians is in excess of seventy per cent. Riverton (Wyo.) Ranger, Oct. 13, 1988, at 1. This figure is up substantially from the forty-five per cent figure cited in the 1982 Report of Special Master Roncalio. Pet. App. at 568a-69a.

[38] The Special Master in *Arizona I* concluded that "[i]t is clear that the water rights of the five Reservations in question cannot be fixed at present uses for this would defeat the basic purpose of reserving water to meet future requirements." Special Master's Report at 263. This Court agreed, ruling that the reserved water "was intended to supply the future as well as the present needs of the Indian Reservations." Arizona I, 373 U.S. at 600. This ruling has not been eroded by subsequent decisions of this Court. *See supra* note 33.

There is no merit to the argument that the Wyoming courts erred in quantifying the reserved water rights under the Treaty in excess of

why this Court should reconsider the PIA standard that has now been followed for twenty-five years in litigation and settlements throughout the West. Accordingly, review should be denied.

C. The Supreme Court of Wyoming Correctly Assigned a Priority Date of 1868—the Date of the Treaty—to the Reserved Water Rights Under the Treaty.

In accordance with this Court's ruling in *Arizona I* that reserved water rights "vest[]" and become "effective" at the time an Indian reservation is created, 373 U.S. at 600, the Supreme Court of Wyoming correctly assigned an 1868 priority date to the water rights reserved under the Treaty. Pet. App. at 72a-75a. Wyoming seeks review of this ruling as it applies to the water rights associated with certain portions of the Reservation.

1. Lands Opened for Non-Indian Settlement, But Not Sold, Under the 1905 Act

Wyoming first challenges this ruling as it applies to the water rights associated with the Reservation lands that were opened for non-Indian settlement under the 1905 Act but never sold (the "unsold lands"). Wyoming asserts that an 1868 priority date should not be assigned to these water rights because the unsold lands were "disestablished" from the Reservation by the 1905 Act.

Review of this issue is not warranted. At the outset, the issue whether the 1905 Act disestablished the unsold lands is beside the point, for it relates only to the jurisdictional authority of the State over these lands, not to the priority date to be assigned to the water rights associated with these lands.[39] In any event, even if the dis-

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the Tribes' historical irrigation needs because, as Wyoming asserts, the Reservation has already achieved "full irrigation development." Pet. at 23-26. As previously noted, Wyoming's assertion that the Reservation has achieved "full irrigation development" is directly contrary to the findings of the Wyoming courts. *See supra* page 14.

[39] The disestablishment cases decided by this Court have involved

establishment issue were relevant, this Court has already resolved the governing legal standards, and the Wyoming courts correctly applied those standards in reaching the fact-specific ruling that these particular lands were not disestablished. Pet. App. at 411a, 225a, 75a.

At the turn of the century, Congress enacted a number of so-called "surplus land" or "opening" acts—such as the 1905 Act—that opened Indian reservations to non-Indian settlement and have since resulted in "a spate of jurisdictional disputes" regarding the status of the opened lands.[40] *Solem v. Bartlett*, 465 U.S. 463, 466-67 (1984) ("*Solem*"). This Court, after resolving a number of these

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disputes regarding the extent of state jurisdiction over civil, criminal, or regulatory matters on a portion of an Indian reservation opened for settlement under a surplus-land act. *E.g.*, Solem v. Bartlett, 465 U.S. 463 (1984). By contrast, the thrust of Wyoming's argument here is that the 1905 Act terminated any reserved water rights under the 1868 Treaty for the unsold lands in the opened portion of the Reservation. Wyoming fails to explain why the reserved water rights for the unsold lands were lost under the 1905 Act, which simply established a trust arrangement for possible land sales to non-Indians, pursuant to which less than 10 per cent of the opened lands were sold. In rulings affirmed by the Wyoming courts, the Special Master correctly held that the Tribes had retained unbroken equitable title to the unsold lands under the 1905 Act, and that "[n]othing in the 1905 Agreement, nor the circumstances surrounding it, would lead one to conclude that the Indians or the [United States] intended that the water rights associated with the opened or ceded lands disappear as of the date of the Agreement." Pet. App. at 415a-16a, 420a, 225a, 75a.

The disestablishment issue was relevant in this case to the issue of the State's jurisdiction over the administration of water rights on the opened portion of the Reservation, *id.* at 75a-79a, but the State has elected not to seek review of the ruling below on that issue.

[40] The resolution of these disputes has been complicated by the fact that there is a notable lack of uniformity among the surplus-land acts, for Congress proceeded "on a reservation-by-reservation basis, with each surplus land Act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." Solem v. Bartlett, 465 U.S. 463, 467 (1984).

disputes, has now developed a "fairly clean analytical structure" for determining whether, for jurisdictional purposes, the opened lands remain part of the original Indian reservation or have been "disestablished" by the surplus-land act from what remains as the "diminished" reservation. *Id.* at 470.

Those legal standards, which are summarized in *Solem*, 465 U.S. at 469-72, involve a case-by-case inquiry, because "[t]he effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Id.* at 469. Because there is a "presumption" that such acts do not diminish a reservation, *id.* at 481, this Court has required "substantial and compelling evidence of a congressional intention to diminish Indian lands." *Id.* at 472.

The Wyoming courts correctly applied these settled legal standards in concluding that neither the terms of the 1905 Act nor the circumstances surrounding the opening of the Reservation provide the requisite evidence of a congressional intention to disestablish the opened lands. Pet. App. at 420a, 225a, 75a. The Special Master, whose rulings were affirmed by the Wyoming courts, concluded that the 1905 Act had not disestablished the opened lands, for it had simply established "a trust relationship, with the United States acting as [the Tribes'] trustee for the sale of certain Indian lands to settlers."[41] *Id.* at 415a. Because of this

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[41] Although the 1905 Act refers to the cession of the opened lands, the United States specifically agreed under the 1905 Act to act only "as trustee for said Indians to dispose of [the opened] lands," and obligated itself to pay the Tribes "the proceeds received from the sale [of the opened lands] only as received." 1905 Act at arts. 1, 9; Pet. App. at 769a, 774a. Thus, the 1905 Act, unlike the 1872 and 1896 cessions, *see supra* note 1, was not an outright sale of Reservation lands in return for a fixed cash payment. Indeed, a provision of the 1905 Act recognizes that some of the opened portion of the Reservation would "remain the property of said Indians." 1905 Act at art. 3; Pet. App. at 772a.

trust arrangement, Indian title to the opened but unsold lands was "not extinguished" by the 1905 Act. *Id.* at 638a. The Special Master specifically concluded that "[n]othing in the 1905 Agreement, nor the circumstances surrounding it, would lead one to conclude that the Indians or the [United States] intended that the water rights associated with the opened or ceded lands disappear as of the date of the Agreement." Pet. App. at 420a.

The rulings below are not in conflict with the decisions cited here by Wyoming. Contrary to Wyoming's assertion that this case involves "circumstances virtually identical" to those in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), Pet. at 28, the Special Master specifically concluded that "this case—and its 1905 Act—differ substantially from the facts and circumstances involved in Rosebud."[42] Pet.

In light of this statutory language and the circumstances surrounding the opening of the Reservation in 1905, the Special Master, in a ruling affirmed by the Wyoming courts, held that the intent of the 1905 Act was not to disestablish the opened portion of the Reservation, but rather for "the Indians [to] convey to the United States only the right to dispose of [these] lands, i.e., to act as an agent with the power of attorney necessary to pass perfect title to a purchaser." Pet. App. at 414a.

[42] One prominent consideration in *Rosebud*, as later summarized in *Solem*, was that "non-Indian settlers flooded into the opened portion of [the] reservation and the area ha[d] long since lost its Indian character." *Solem*, 465 U.S. at 471. By contrast, on the Wind River Reservation, less than ten per cent of the opened lands were acquired by non-Indian settlers under the 1905 Act, Pet. App. at 412a-13a, and the vast majority of the opened lands that were not sold under the 1905 Act are still owned by the Tribes.

Wyoming focuses on the fact that the Special Master had distinguished this case from *Rosebud* by the absence of the word "convey" in Article I of the 1905 Act. Pet. at 28. But the Special Master treated this point as only one "example" of why "this case—and its 1905 Act—differ substantially from the facts and circumstances involved in Rosebud." Pet. App. at 419a.

App. at 419a. Nor, as Wyoming asserts, is "the reasoning below in conflict with the principles announced in" *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) ("*Klamath*"), and *Arizona II*.[43] Pet. at 28. Finally, Wyoming's repeated assertion that the opened, but unsold, lands on the Reservation were "public lands," Pet. at 27, 4, 6, was correctly rejected not only by the Wyoming courts in this case,[44] but also by the Department of the Interior in a proceeding nearly four decades ago.[45]

In sum, even if the disestablishment issue were relevant, the Wyoming courts correctly applied this Court's well-settled legal standards to the particular facts surrounding the 1905 Act. Review is not warranted.

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[43] Because the diminution of the Indian reservation in *Klamath* had been "acknowledged," 473 U.S. at 772 n.22, the Court's analysis of the "savings clause" in that case focused on what treaty rights had survived the conceded diminution of the reservation. By contrast, the question here is whether—in light of the "savings clause" to the 1905 Act, the other provisions of that Act, and the surrounding circumstances—Congress intended to terminate the reserved water rights under the 1868 Treaty for the opened, but unsold, lands.

Similarly, the State's reliance on *Arizona II* is misplaced because the portion of that decision cited here by the State refers to the proper priority date to be assigned to water rights associated with *new* lands that the United States has added to an Indian reservation after it was established. 460 U.S. at 641. By contrast, the issue presented here is whether the water rights associated with lands that were part of the *original* Reservation are entitled to a Treaty-based priority date.

[44] In a ruling affirmed by the Wyoming courts, the Special Master properly concluded that the unsold lands were not public lands, but rather had always remained "Indian lands" under this Court's controlling decision in Ash Sheep Co. v. United States, 252 U.S. 159 (1920). Pet. App. at 415a-16a.

[45] *In re Gallivan*, 60 I.D. 417, 419 (1950) (ruling that the federal statute governing mineral leasing on "public lands," 41 Stat. 437 (1920), was inapplicable to "the ceded but undisposed-of lands" on the Reservation, because these were "Indian lands").

2. Reservation Lands Reacquired by the Tribes

Wyoming asserts that the Supreme Court of Wyoming erred in assigning an 1868 priority date to the water rights associated with Reservation lands that have been reacquired by the Tribes from non-Indians who had purchased the land from individual Indian allottees ("reacquired allottee lands") or had acquired it under the homestead laws ("reacquired homestead lands"). The ruling below is said to conflict with two Ninth Circuit decisions. *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (*"Anderson"*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (*"Walton II"*).

Review of this question is not warranted.[46] With respect to the water rights associated with the reacquired allottee lands, Wyoming asserts that the ruling below is in conflict with *Walton II* and *Anderson* because the Supreme Court of Wyoming "required no showing [by the Tribes] that the reserved right continued to be used by the intervening non-Indian owner[s]." Pet. at 29. The Ninth Circuit cases hold that reserved water rights on lands previously held by allottees are lost if not maintained through continuous use by the subsequent non-Indian owner. *Anderson*, 736 F.2d at 1362; *Walton II*, 647 F.2d at 51. But, in this proceeding—where the Tribes have consistently claimed an 1868 priority date for the reserved water rights associated with the reacquired allottee lands—, neither Wyoming nor any other party made a proffer that any of these reserved water rights had in fact been lost through non-use. Because there was no such proffer, the Supreme Court of Wyoming, in a ruling fully consistent with the Ninth Cir-

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[46] If this Court were to grant review of this question, the Tribes agree with Riverton, Cross-Pet. at 22, that the Court should review the question as it applies not only to the reserved water rights claimed by the Tribes, but also to those claimed by the non-Indians who asserted reserved water rights in this proceeding. *See* Tribes' Cross-Petition at 29-30.

cuit decisions, properly assigned these water rights a Treaty-based priority date of 1868.

Nor is it apparent that there is a conflict with the Ninth Circuit regarding the priority date for the reserved water rights associated with the reacquired homestead lands. The opinion below does not expressly address this question, *see* Pet. App. at 75a, and the Supreme Court of Wyoming could well have concluded that, here too, Wyoming had failed to make the appropriate proffer. In any event, there is no express or implied criticism of *Anderson* in the decision of the Supreme Court of Wyoming and thus no conflict that would be apparent to other courts that might later address the issue.[47]

D. The Supreme Court of Wyoming Demonstrated More than Ample "Sensitivity" to Non-Indian Water Users.

Riverton asserts that the decision of the Supreme Court of Wyoming is in conflict with *United States v. New Mexico*, 438 U.S. 696 (1978) (*"New Mexico"*). According to Riverton, *New Mexico* "instructs that the quantification of a Federal reserved water right must be sensitive not only

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[47] In any event, the issue whether a non-Indian settler has acquired reserved water rights when purchasing lands on an Indian reservation would necessarily depend on the terms of the specific surplus-land act that opened the Indian reservation to non-Indian settlement. There is considerable variety among these statutes because they were enacted "on a reservation-by-reservation basis, with each surplus land Act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." Solem, 465 U.S. at 467. Accordingly, the mere existence of different results between two decisions on this issue does not necessarily mean that there is a conflict between them.

Moreover, even assuming *arguendo* that there was an implicit conflict with *Anderson* and that the decision below was in error, resolving this issue will have no practical effect upon the parties, for, as previously noted, the state district court deleted its only finding that the quantification of reserved water rights in this proceeding will have any adverse effect on other water users. *See supra* note 8.

to Congress' policy of deference to state water law, but also to the rights of state and private water users who are the victims of the quantification." Cross-Pet. at 10-11. Riverton urges this Court to grant review "to apply its decision in *United States v. New Mexico*, and thereby to protect state and private water users in the Big Horn Basin from a gallon-for-gallon reduction in their water rights, and to rescue the 1905 Act from the dustbin of history." *Id.* at 11.

This argument is vastly overblown, and review is not warranted. Two of the reasons why have already been noted: First, the Supreme Court of Wyoming specifically found that this case does *not* give rise to the concern expressed in *New Mexico*, 438 U.S. at 705, that reserved water rights may "require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *See supra* pages 12-13. Second, the Wyoming courts carefully analyzed the 1905 Act and correctly concluded that Congress had not deferred to state law for the acquisition of water rights for the Reservation. *See supra* pages 19-24. In short, neither of the two factors cited by Riverton as warranting "sensitivity" under *New Mexico*—reductions in available water to non-Indian users and congressional deference to state water law—is even presented in this case.

In any event, the Supreme Court of Wyoming demonstrated more than ample sensitivity to the needs of non-Indian water appropriators.[48] In response to the same ar-

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[48] Riverton appears to read *New Mexico* as requiring the imposition of "equitable" remedies to protect non-Indian water users from any adverse impact arising from the quantification of reserved water rights. Cross-Pet. at 17. But no such remedies were even considered in *New Mexico*, and this Court has consistently rejected the argument that reserved water rights must be balanced against the state water rights of junior appropriators. Winters, 207 U.S. at 570-71, 576 (rejecting claim of junior non-Indian water users who had already invested "many

gument presented here, the Supreme Court of Wyoming cited a number of key rulings it had rendered against the Tribes and the United States and concluded that "[a]ll of this evidences a sufficient sensitivity to the water needs of other water users." Pet. App. at 72a. Indeed, as set forth in the Tribes' conditional cross-petition, the state supreme court was excessively sensitive to the needs of non-Indian water users, for several of the key rulings against the Tribes and the United States are in error.

Finally, whereas Riverton asserts that the Wyoming courts lacked "sensitivity" towards the non-Indian water users, Riverton itself is wholly lacking in any sensitivity to the different policy considerations involved in cases quantifying Indian reserved water rights, such as this proceeding, than in cases quantifying federal reserved water

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thousands of dollars" and who claimed that, if senior reserved water rights were recognized, "their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged"); Arizona I, 373 U.S. at 596-97 (rejecting the argument that "equitable apportionment" should be "used to divide the water between the Indians and the other people in the State of Arizona"); Cappaert, 426 U.S. at 138-39 (rejecting the argument that reserved water rights "call[] for a balancing of competing interests" and adhering to both *Winters* and *Arizona I*).

Accordingly, the Supreme Court of Wyoming correctly rejected the proposed storage requirements and other limitations on the exercise by the Tribes of their reserved water rights. As noted below, "[t]he requirement that [the Tribes] must first construct storage facilities to supply their entitlement flies in the face of the object of the reserved water right—a prior entitlement to the waters." Pet. App. at 71a.

When read in proper context, the comment regarding "sensitivity" in Justice Powell's partial dissent in *New Mexico*, 438 U.S. at 718, and the passages of the majority opinion relied upon here by Riverton, 438 U.S. at 700, 701-02, 705, simply stand for the proposition that the courts should engage in a careful examination of the purposes for which water was impliedly reserved. That was done in this proceeding, and indeed the Court in *New Mexico* specifically cites both *Winters* and *Arizona I* as examples of that careful consideration. 438 U.S. at 698-705.

rights, such as *New Mexico*.[49] Those differences favor lesser awards in federal cases, than in Indian cases.

In sum, Riverton is simply wrong in asserting that "[t]he circumstances of this case fall squarely within *New Mexico*." Cross-Pet. at 13. In any event, the ruling of the Supreme Court of Wyoming is fully consistent with this Court's decision in *New Mexico*.

E. Riverton's Discount-Rate Argument Is Without Merit and Unworthy of Review.

Riverton contends that the Wyoming courts erred, in assessing the economic feasibility of possible future irrigation of presently undeveloped tribal lands, by using an economic discount rate lower than one prescribed by a federal statute, 41 U.S.C. § 1962d-17(a), for the formulation and evaluation of federal water projects. Cross-Pet. at 19-22. Credible expert testimony supported the discount rate (4 per cent) used by the Wyoming courts. *See* Pet. App. at 53a-54a. Riverton claims that, nonetheless, the courts were required to use 7-1/8 per cent, the rate prescribed under the federal statute for the year 1979.

On its face, the statute on which Riverton relies has no application to quantification of Indian water rights. Riverton cites no authority suggesting such an application, and relies weakly on one decision holding only that Con-

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[49] Among other considerations, the reserved water rights here were established under a Treaty with the United States as opposed to unilateral action by Congress or the President in establishing non-Indian federal public lands; non-Indian federal water rights can be disposed of by the federal government without limitation, but Congress cannot abrogate Indian treaty rights without providing just compensation; and public lands of the federal government are generally subject to state regulation, whereas Indian lands are not. The award of water to fulfill the primary purpose of maintaining a national forest should be smaller than a quantification of the water rights necessary to establish a permanent Indian settlement. *See* F. Cohen, Handbook of Federal Indian Law 581-85 (1982).

gress intended the statutory rate to be used in environmental-impact statements. Cross-Pet. at 22 n.27 (citing *Johnson v. Davis*, 698 F.2d 1088, 1092 (10th Cir. 1983)). Riverton's argument also depends on its assumption that the Tribes could implement future irrigation projects only by obtaining federal funds, which is sheer speculation. Even if they did so, and that were held to make the statute relevant, any applicable discount rates under the statute would be those in effect at the future times when the projects were proposed and evaluated, which of course is presently unknowable. The rate for the year 1979 would have no relevance whatever.

The Wyoming courts correctly held that the statute does not mandate using the 7-1/8 per cent rate in this proceeding. Pet. App. at 53a-54a. Review of this question is unwarranted.

F. The Supreme Court of Wyoming Correctly Rejected Riverton's Estoppel Argument.

Riverton argues that the Wyoming courts erred in not holding the United States estopped from asserting reserved water rights on behalf of the Tribes. Cross-Pet. at 24-30. This claim of estoppel is not based on alleged misrepresentations by federal officials. Rather, Riverton asserts that the United States should be estopped because of the acts of "Congress itself," namely, the passage of the various homesteading acts and the 1905 Act. Cross-Pet. at 26 & n.37.

Review of this insubstantial claim should be denied. This Court has "left open the possibility of estoppel against the Government only in a rather narrow possible range of circumstances," *Heckler v. Community Health Services*, 467 U.S. 51, 68 (1984) (Rehnquist, J., concurring in judgment), and the Supreme Court of Wyoming correctly held that this case does not present such circumstances. Pet. App. at 22a-23a. Although Riverton focuses on attacking the ruling below that "affirmative misconduct" by the United

States had not been established, Riverton and the other moving parties failed to prove several other essential elements of estoppel, including detriment to their state water rights and reasonable reliance upon the 1905 Act.[50] In any event, even if the United States were estopped in this proceeding, the water rights reserved under the Treaty are rights of the Tribes, not the United States. Riverton has not even contended that the Tribes' conduct is a basis for its estoppel claim, nor has Riverton explained how conduct of the United States vis-à-vis non-Indian settlers can affect the Tribes' rights under the Treaty.

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[50] The state district court specifically deleted the finding upon which Riverton's claim of detriment to state water rights is based. *See supra* note 8. Moreover, Riverton cannot show reasonable reliance based on the water proviso to the 1905 Act because, as the Wyoming courts correctly held, the proviso was intended to assist the Indians in securing state water rights not in lieu of their reserved water rights under the 1868 Treaty, but rather as a pre-*Winters* precaution to safeguard their right to water. *See supra* pages 19-24. In any event, the United States formally began to assert reserved water rights on behalf of the Tribes after this Court's 1908 ruling in *Winters*, and the federal district court expressly recognized such rights in 1926. *See supra* pages 10-12.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition in No. 88-309 and the Cross-Petition in No. 88-553.

Respectfully submitted,

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November 21, 1988

APPENDIX

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING

No. 753.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

ALBERT HAMPLEMAN,

Defendant.

D E C R E E

Now on this day the above entitled cause coming on to be heard, the plaintiff appearing by DAVID J. HOWELL, Assistant United States Attorney for the District of Wyoming, and the defendant, ALBERT HAMPLEMAN, appearing by his attorneys, DOUGLAS A. PRESTON, Attorney General for the State of Wyoming, and WILFRID O'LEARY, Deputy Attorney General for the State of Wyoming, and a stipulation by and between the parties hereto having heretofore been filed admitting certain of the allegations contained in plaintiff's bill of complaint, and the Court having heard the testimony of the witnesses produced by said plaintiff, and the arguments of counsel, and being fully advised in the premises, doth find for the plaintiff, and against the defendant, generally, and that the lands, ditches and water rights of the Indian allottees named in plaintiff's bill of complaint are within the absolute and exclusive jurisdiction of plaintiff.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED, that the defendant, ALBERT HAMPLEMAN, his servants, agents and employees, be, and they are hereby perpetually enjoined from hereafter committing any

trespass upon, or from in any manner impeding, obstructing or preventing the waters of South Fork of Mud Creek and of Red Creek from flowing down their natural channels to the headgates of the said Indian allottees named in plaintiff's bill of complaint, and from in any manner interfering with or preventing the use by said Indian allottees of an amount of water from said streams reasonably necessary for the irrigation of their said allotments on the basis of one cubic foot of water per second of time for each seventy (70) acres of irrigable land on said allotments.

IT IS FURTHER ORDERED that the defendant herein shall pay the costs of this action, to be taxed.

Dated this 26th day of June, A.D. 1916.

(Signed) John A. Riner

Judge.

EXHIBIT B

AGREEMENT REGARDING WATER RIGHTS IN THE CROWHEART IRRIGATION UNIT ON THE WIND RIVER INDIAN RESERVATION

WHEREAS there has arisen a dispute between Indian and non-Indian irrigators in the Crowheart Irrigation Unit ("Unit") on the Wind River Indian Reservation ("Reservation") regarding their respective rights to water in the Dinwoody Canal;

WHEREAS the Shoshone and Arapaho Tribes ("Tribes") and the State of Wyoming ("State") have endeavored to resolve this dispute through joint-factfinding and negotiation;

WHEREAS the Tribes and the State agree that the water shortages experienced during this growing season on particular fields in the Unit are not the result of an actual shortage of water supply, but rather are the result of problems with the management of the water supply and of the need for structural improvement in the irrigation and delivery system;

WHEREAS the Tribes and the State believe that, with proper management of the Unit, the Indian and the non-Indian irrigators should be able to get the full amount of water to which they would be legally entitled;

NOW, THEREFORE, be it resolved that the Tribes and the State agree as follows:

1. The Unit should be managed as efficiently as practicable, so that, if possible, the Indian and the non-Indian irrigators are able to get the full amount of water to which they would be legally entitled.

2. There shall be created a Joint Tribal-State Advisory Committee ("Committee") for the purpose of making joint recommendations to the Bureau of Indian Affairs ("BIA")

regarding any necessary changes to the management of the Unit. The Tribes and the State shall each appoint one representative to the Committee.

3. In the event that the representatives of the Committee are unable to make a joint recommendation, the Tribes and the State are free to pursue their respective rights under the Decree in the Big Horn Water Adjudication and such other rights as they may have. This agreement does not waive any rights that the Tribes or the State have under the Decree or otherwise, but rather establishes a means by which the Tribes and the State will first attempt to resolve any disputes regarding the supply of water within the Unit before resorting to litigation.

4. This agreement shall expire on October 1, 1988, unless extended in writing by the Tribes and the State.

The Shoshone Tribe

Date: 7/29/88 By: /s/ John Washakie

The Arapaho Tribe

Date: 7/29/88 By: /s/ Gary Collins

The State of Wyoming

Date: 7/29/88 By: /s/ Mike Sullivan

Supreme Court, U.S.
FILED
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CLERK

No. 88-553

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CITY OF RIVERTON, WYOMING, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE and NORTHERN ARAPAHOE TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming

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RESPONDENT'S BRIEF IN OPPOSITION

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November 21, 1988

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RESPONDENT'S BRIEF IN OPPOSITION

The Cross-Respondent, Red Creek Cattle Company, Barbara Webber, and Landis Webber, respectfully request that this Court deny the Cross-Petition for certiorari seeking review of the Wyoming Supreme Court's opinion and judgment in this case. That opinion is reported at 753 P.2d 76 (Wyo. 1988).

STATEMENT OF THE CASE

The history of the general adjudication and the general facts established by the evidence in the numerous hearings have been adequately set forth in the statement

of the case contained in the Cross-Petition of the *City of Riverton, Wyoming, et al. v. United States of America, et al.* at 2-8; and the statement of the case set forth in the Cross-Petition of the *Shoshone Tribe and Northern Arapahoe Tribe of the Wind River Indian Reservation v. The State of Wyoming, et al.*, No. 88-492; and the Petition of the *State of Wyoming v. United States of America, et al.*, No. 88-309.

The facts are supplemented only to the extent to which they apply to the narrow issue directed to these Cross-Respondents (hereafter Respondents). Respondents, together with Bertha Jones and Grace Graboski, are successors in interest to Indian allottees. As such, the Wyoming Supreme Court granted to them a water right with a priority date of 1868 for those lands which can be shown to have been irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter. The evidence indicates that the lands for which Landis Webber and Barbara Webber, and Red Creek Cattle Company claimed a 1868 priority had been continuously irrigated since the time their Indian predecessors had been granted allotments and within a reasonable time thereafter. Testimony of Landis Webber and Exhibits introduced at pages 406-440 of the Trial Transcript of the Lander Hearings. Bertha Jones and Grace Graboski only presented evidence of ownership of Indian allotments. Their permits and certificates of appropriation were previously in evidence through the State of Wyoming records. The pleadings requested the 1868 priority date for lands historically irrigated by their Indian allottees or place under irrigation within a reasonable time thereafter. None of the successors to Indian allottees sought to increase their acreage pursuant to the 1868 right.

REASONS WHY PETITION SHOULD BE DENIED

1. No real conflict exists between the opinion of the Ninth Circuit Court of Appeals and the Wyoming Supreme Court.

The reasons set forth by Cross-Petitioners (hereafter Petitioners) in requesting this Court to grant the writ, only Question III (pages 22-24 of the Cross-Petition) is directed to these Respondents. Petitioners are not challenging the award of an 1868 water right. The sole question presented is whether the Respondents, as successors to Indian allottees, may rely upon the 1868 priority only if the Respondents maintained such rights with continuous and uninterrupted use.

The Wyoming Supreme Court relied on *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981), cert. denied, 475 U.S. 1010 (1986) and numerous other Federal Court decisions, as its basis for awarding a reservation date of priority of 1868 to the Respondents. While the Wyoming Supreme Court did not specifically state the use had to be continuous and uninterrupted, there was probably no need to do so.

For the Respondents, Landis Webber testified and introduced Exihibits establishing the historical use of the water right from the time the allotment was improved by the Indian precedessors. The lands were irrigated by the Indians and later by the Indians successors pursuant to the 1868 right until such time as the State of Wyoming interfered with this historical use around 1948. Thereafter, the lands were continuously irrigated pursuant to the State enforced permit. The issue of continuous and uninterrupted use was never challenged at trial by the Petitioners or any other party.

Although evidence of continuous and uninterrupted use of water on the lands of Bertha Jones and Grace Gra-

boski was not introduced at trial, the documents evidencing their State permits and certificates of appropriation demonstrate that the use had been continuous and uninterrupted. By definition, the award of a certificate of appropriation on all of the historically irrigated allotments indicated continuous beneficial use.

Consequently, the matter of applying a rule of law which Petitioners believe to be omitted from the Wyoming opinion, thus being characterized as a conflict in the Ninth Circuit and the Wyoming decisions, is meaningless under the facts of this case. Evidence has been already presented, or will be presented upon remand, of the continuous use of water on the allotment lands. No claim has been made to expand the water rights from those historically adjudicated.

2. The issue presented by Petitioners is of minor importance in the overall case.

The Petition of the State of Wyoming (*State of Wyoming v. The United States of America, et al.*, No. 88-309); the Cross-Petition of the Tribes (*Shoshone Tribes and Northern Arapahoe Tribe of the Wind River Indian Reservation v. State of Wyoming, et al.*, No. 88-492); and the Cross-Petition in this case all raise numerous important and complex issues. However, while discussing the award to successors to Indian allottees, Wyoming did not attack the award as a Question Presented. The Tribes only addressed the award in relation to the nature of reacquired lands by the Indians. The balance of the issues raised by all of the Petitioners address complex legal issues affecting thousands of water users, both Indian and Non-Indian; involving the interplay between Federally awarded reserve rights and State adjudicated rights involving thousands of acre feet of water; and present and future water uses.

In comparison, the narrow issue presented by Petitioners concerning the reserved rights of these Respond-

ents pales in significance. Given the fact that Rspondents' water use has been continuous and uninterrupted, granting the writ for review of this legal issue would become almost meaningless. The United States Supreme Court should not become distracted from the larger and more important issues presented in the Petitions of the various parties.

3. The opinion of the Wyoming Supreme Court was accurate and correct.

The Wyoming Supreme Court reached the right result in awarding a reserved water right to successors to Indian allottees. The result was based upon substantial evidence introduced at at least two hearings concerning Respondents' claims. The Court was apparently persuaded by the well considered reasoning and rulings from the Ninth Circuit Court of Appeals and this Court concerning reserved water rights. The Wyoming Court remanded this award to a lower court to determine the acreage irrigated by the Indian predecessors and their successors. These lands will be the same lands for which certificates for appropriation were already awarded by the State Engineer, which award by definition was based upon continuous beneficial use.

4. The award of reserved water rights to the Respondents was fair.

The evidence demonstrated that Respondents enjoyed an 1868 priority use until the late 1940's, when the State of Wyoming forced the 1905 adjudication on the Respondents. Respondents on two separate occasions attempted to litigate the reserved right issue, but the matter was never appropriately reached by the Wyoming Supreme Court. *Merrill v. Bishop*, 237 P.2d 186 (1951) and 287 P.2d 620 (1955). While Respondents failed before the Special Master and the District Court in the case below, the Wyoming Supreme Court finally reached a decision which was fair and equitable in awarding a

reserved right to these Respondents, a right for which they had used or fought for since the turn of the century.

CONCLUSION

For these various reasons, the Petition for Writ of Certiorari as to the narrow issue of continuous use should be denied.

Respectfully submitted,

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Nos. 88-309, 88-492 and 88-553

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, CROSS-PETITIONERS

v.

STATE OF WYOMING, ET AL.

CITY OF RIVERTON, WYOMING, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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QUESTIONS PRESENTED[1]

1. Whether the "water proviso" of the Act of March 3, 1905 (33 Stat. 1020)—which provides that the remaining balance of an $85,000 sum to be obtained from the sale of certain lands of the Wind River Indian Reservation shall, following a per capita distribution of $50 per Indian, "become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, * * * "—demonstrates that no federal reserved water rights were created when that Reservation was set aside in 1868 by the Second Treaty of Fort Bridger, or, alternatively, whether that water proviso terminated all reserved water rights created by the 1868 Treaty.

2. Whether the Act of March 3, 1905, which provided for the sale of certain reservation lands of the Wind River Indian Reservation and further provided that the Indians were to be compensated out of the sales proceeds as the lands were sold, terminated the federal reserved water rights attaching to lands that were never sold.

3. Whether this Court should reconsider its holding in *Arizona* v. *California,* 373 U.S. 546 (1963), that the amount of water reserved for agricultural purposes when an Indian reservation is established is that quantity of water that is required to irrigate the practicably irrigable acreage within the reservation.

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[1] This summation of the questions presented encompasses only those questions raised in the petition filed by the State of Wyoming in No. 88-309 and the cross-petition filed by the City of Riverton, Wyoming, et al., in No. 88-553. As discussed in the text below, the United States suggests that the Court grant review of the additional questions presented in the conditional cross-petition filed by the Shoshone and Northern Arapaho Tribes in No. 88-492, in the event that the Court grants the State's petition.

4. Whether the Wyoming Supreme Court erred by failing to use the discount rate formula established pursuant to Section 80(a) of the Water Resources Development Act of 1974, 88 Stat. 34, 42 U.S.C. 1962d-17(a), to determine whether certain reservation lands that have never been irrigated are practicably irrigable.

5. Whether the Wyoming Supreme Court correctly resolved issues concerning the status of water rights for lands that had at some previous time been conveyed to non-Indians.

6. Whether the United States may be estopped in this case from asserting reserved water rights on behalf of the Indian Tribes pursuant to a federal treaty.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-309

STATE OF WYOMING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 88-492

SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, CROSS-PETITIONERS

v.

STATE OF WYOMING, ET AL.

No. 88-553

CITY OF RIVERTON, WYOMING, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Wyoming Supreme Court (Pet. App. 1a-119a) is reported at 753 P.2d 76. The district court's amended judgment and decree (Pet. App. 168a-184a), order ruling on motions to alter or amend the decision

(Pet. App. 185a-210a), and decision (Pet. App. 202a-279a) are not yet reported. The report and decree of the special master (Pet. App. 367a-708a) are also unreported.

JURISDICTION

The decision of the Wyoming Supreme Court (Pet. App. 1a) was entered on February 24, 1988. Timely petitions for rehearing were denied on April 22, 1988 (Pet. App. 120a). On July 7, 1988, Justice White extended the time for filing a petition for a writ of certiorari to August 20, 1988. The petition for a writ of certiorari was filed on August 18, 1988. The cross-petitions in Nos. 88-492 and 88-553 were filed on September 21, 1988, and are timely under Rule 19.5 of the rules of this Court. The jurisdiction of this Court over the petition and cross-petitions is invoked under 28 U.S.C. 1257(3).

STATEMENT

The State of Wyoming petitions for a writ of certiorari to review the Wyoming Supreme Court's decision, in the first phase of a general stream adjudication, recognizing the reserved water rights of the Shoshone and Northern Arapaho Indian Tribes. The Indian Tribes and certain non-Indian respondents have filed cross-petitions for a writ of certiorari.

1. In 1977, Wyoming enacted legislation authorizing its Attorney General to "institute an action to have determined in a general adjudication the nature, extent, and relative priority of the water rights of all persons in any river system and all other sources * * * " (Wyo. Stat. § 1-37-106 (1977) (Pet. App. 726a-728a)). The State then promptly commenced this action in the Wyoming District Court for the Fifth Judicial District. The complaint sought a general adjudication of the rights to use water in Water

Division No. 3, which consists primarily of that portion of the Big Horn River drainage system located within Wyoming, including the Wind River Indian Reservation.[2] The complaint requested, in essence, a determination of all water rights within Water Division No. 3. The United States was joined under the McCarran Amendment, 43 U.S.C. 666.

The state district court, after granting intervention for the Shoshone Tribe and the Northern Arapaho Tribe of the Wind River Reservation, referred the case to a special master.[3] The special master divided the case into three phases. Phase I—the phase at issue here—encompasses water rights reserved by federal law and held by the Shoshone and Northern Arapaho Tribes or by the United States on their behalf, and Indian reserved rights claimed by non-Indian successors to Indian allottees.[4]

a. The Wind River Indian Reservation was established on July 3, 1868, by the Second Treaty of Fort Bridger, 15 Stat. 673 (Pet. App. 793a-803a), which was entered into by the United States and the Shoshone and Bannock Tribes.[5]

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[2] Water Division No. 3 also included the Clark's Fork of the Yellowstone River (Pet. App. 9a).

[3] The United States had initially removed the action to the United States District Court for the District of Wyoming, but that court remanded the suit back to state court (Pet. App. 718a-724a).

[4] Phase II covers all non-Indian reserved water rights claimed by the United States in Water Division No. 3, while Phase III involves all water rights in that division not covered by Phases I and II. Phase III includes rights evidenced by state permits or certificates held by the United States, its agencies, and the Shoshone and Arapaho Tribes. Phase II was resolved by a stipulation and judgment, while Phase III is still pending (Pet. App. 13a-15a).

[5] The Bannock Tribe, as provided in Article II of the 1868 Treaty (15 Stat. 674), subsequently chose for itself the Fort Hall Reservation in what is now the State of Idaho. There is also a band of Shoshone Indians on the Fort Hall Reservation.

Under the 1868 Treaty, the Shoshone Tribe relinquished to the United States all claims to more than 44 million acres in what are now the States of Colorado, Utah, Idaho, and Wyoming.[6] In return, the Shoshone Tribe accepted the Wind River Reservation in what is now Wyoming. The Reservation consisted of approximately 3 million acres "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians * * * and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them" (art. II, 15 Stat. 674). The Indians agreed to make the Reservation their permanent home (art. IV, 15 Stat. 674-675). The Treaty provided for the allotment of reservation lands to individual Indians who "shall desire to commence farming" (art. VI, 15 Stat. 675) and further provided for seeds, implements, and agricultural instruction for Indians who commenced cultivation (art. VIII, 15 Stat. 675-676). In 1878, the Northern Arapaho Tribe was settled on the Wind River Reservation without the consent of the Shoshone Tribe. See *United States* v. *Shoshone Tribe,* 304 U.S. 111, 114 (1938).

By an agreement signed in 1904 and approved with modification by the Act of March 3, 1905, ch. 1452, 33 Stat. 1016 (Pet. App. 769a-781a), the Shoshone and Northern Arapaho Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest * * * " in the portion of the Reservation located north of the Wind River, as well as the portion located east of the

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[6] The boundaries of the "Shoshone country" were described in Article IV of the First Treaty of Fort Bridger, concluded on July 2, 1863, 18 Stat. 685, 686. The First Treaty of Fort Bridger was one of several treaties concluded in 1863 between the United States and the various bands of Shoshone Indians. See *Northwestern Band of Shoshone Indians* v. *United States,* 324 U.S. 335 (1945).

Popo Agie River (art. I, 33 Stat. 1016).[7] The ceded lands, which amounted to approximately 1,480,000 acres (Pet. App. 10a), were to be disposed of "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash," and the United States agreed to pay to the Indians the proceeds derived from the sales of the lands (art. II, 33 Stat. 1016-1017). The United States, however, did not guarantee to find purchasers for the lands but, rather, agreed to "act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided" (art. IX, 33 Stat. 1018).

Article III of the 1904 Agreement provided that $85,000 of the sum derived from the sale of the subject lands would be devoted to making a per capita cash payment of $50 dollars to each Indian (33 Stat. 1017). Following this per capita payment, the remaining balance of the $85,000 sum "shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve" (33 Stat. 1017).

By 1914, approximately 129,000 acres of the 1,480,000 acres covered by the 1904 Agreement (and 1905 Act) had been sold. See Pet. App. 412a. In 1915, however, the Sec-

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[7] The Indians had made two earlier cessions of lands included within the Wind River Indian Reservation as established by the 1868 Treaty. These were the "Lander Purchase" or "Brunot Agreement" executed on September 26, 1872, and ratified on December 15, 1874, 18 Stat. 291 (Pet. App. 409a), and the "Thermopolis Purchase" or "First McLaughlin Agreement" executed on April 21, 1896, and ratified on June 7, 1897 (30 Stat. 93 (Pet. App. 410a)).

retary of the Interior temporarily postponed further sale of the ceded lands, and from 1915 through 1934 only a few acres were sold. See *id.* at 412a-413a. In 1934, Congress enacted the Indian Reorganization Act, ch. 576, 48 Stat. 984, which, among other things, authorized the Secretary of the Interior to restore fully to permanent tribal ownership the remaining surplus lands of any Indian reservation previously opened to sale or other forms of disposal. See 25 U.S.C. 463(a). Later that same year, the Secretary temporarily withdrew from further disposition the remaining land ceded under the 1904 Agreement (Pet. App. 413a). Subsequently, under a series of restoration orders approved by Congress (*id.* at 731a-752a), all of the remaining undisposed lands ceded by the 1904 Agreement were fully restored to permanent tribal ownership. See *id.* at 413a. In addition, numerous parcels of land on the Reservation that had once passed into non-Indian ownership, either by sale under the 1905 Act or by purchase from Indian allottees, have been reacquired on behalf of the Tribes. See *id.* at 11a.

b. The special master issued his report and recommended final decree on December 15, 1982 (Pet. App. 367a-708a).[8] The special master found that the purpose of the 1868 Treaty was to establish a permanent homeland for the Indians and that this purpose included, but was not limited to, agricultural development of the reservation lands suitable for that purpose (Pet. App. 442a-443a, 643a). Applying the doctrine announced by this Court in *Winters* v. *United States,* 207 U.S. 564 (1908), the special

[8] We describe here only those rulings of the special master, the district court, and the state supreme court that are the most pertinent to the issues raised in the petition. The special master and state courts also entered various other rulings that are discussed in the cross-petition filed by the Tribes.

master found that "Congress, by ratification of the Treaty of 1868, impliedly created a reserved right for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty" (Pet. App. 641a). The special master then determined that the reserved water rights created by the 1868 Treaty had not been terminated by the 1904 Agreement and that the Tribes continue to hold reserved water rights with an 1868 priority date for lands that were never sold pursuant to the 1904 Agreement (*id.* at 411a-420a, 638a-639a). He further ruled that the United States was not estopped from asserting federal reserved water rights on behalf of the Indians (*id.* at 623a-627a, 687a-688a).

The special master recommended the award of an 1868 priority date with regard to all tribal, allotted, or Indian fee land within the reservation that has never left Indian ownership or that had left Indian ownership but had been reacquired by the Tribes prior to the date of his report, provided that the lands were shown to be practicably irrigable (Pet. App. 424a-425a, 639a, 641a-642a). The special master also ruled that non-Indians who purchased land from Indian allottees did not acquire a share of the Indians' reserved water rights (*id.* at 425a-431a, 640a).

Turning to the task of quantifying the agricultural reserved water right, the special master ruled that the amount of water reserved for such purposes was that quantity required to irrigate those lands shown to be "practicably irrigable acres" (Pet. App. 534a). He defined "practicably irrigable acres" (in accordance with the use "agreed upon [in this case] by counsel for the State, the United States and the Tribes") as defined to mean "those acres susceptible to sustained irrigation at reasonable costs" (*ibid.*). Applying this standard, the special master first addressed and resolved issues regarding the Reservation's "historic acres"—lands that are now irrigated or that have been irrigated in the past (*id.* at 463a-531a, 643a-

672a). He then addressed and resolved matters concerning the Reservation's "future lands"—lands that have not been irrigated to date but that are claimed to be practicably irrigable (*id.* at 532a-591a, 672a-682a). In resolving the future lands issue, the special master accepted the testimony of the United States' witnesses that a "real" discount rate of four percent—which excludes the effects of present or expected inflation—should be used in determining whether the future lands can be feasibly irrigated (*id.* at 574a-580a, 680a). The special master ultimately recommended an award of 477,300 acre-feet per year for irrigation purposes.[9] The special master also recommended an award of additional reserved waters based on non-agricultural purposes (*id.* at 696a-702a).[10]

c. The district court accepted most of the recommendations of the special master (Pet. App. 121a-131a, 168a-279a). The district court concluded, however, that the primary purpose of the 1868 Treaty was to create an agricultural reservation, and it therefore rejected the special master's recommendations to confirm reserved

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[9] This figure was based on a recommended award of 288,355 acre-feet needed to irrigate 54,389 acres of Indian lands, including Indian-owned fee lands, that have historically been irrigated, plus an additional 188,937 acre-feet needed to irrigate 48,520 acres in "future projects" (Pet. App. 695a). The special master also recommended that the decree limit construction of any irrigation projects for the future lands to no more than ten percent of total awarded acreage for future projects in any given decade following 1982, unless sufficient replacement waters are made available through upstream storage facilities so as to allow non-Indian water users to continue to use the same amounts as they are presently using (*id.* at 580a-584a).

[10] The special master subsequently issued a Supplemental and Final Report (Pet. App. 280a-366a) addressing primarily the claims of non-Indians holding former allotted lands. The special master ruled that "non-Indians who purchase from Indians do not receive superior rights stemming from the treaty" (*id.* at 286a).

water rights for non-agricultural purposes (*id.* at 182a, 216a-222a, 262a-263a). The district court also rejected the special master's recommendation of an 1868 priority date for lands that had passed into non-Indian ownership and had since been reacquired. The court ruled that the priority date for such lands was to be the earliest of: 1) the date upon which the land left Indian ownership and was purchased by a non-Indian; 2) the date of the applicable state water permit; or 3) the date of first application of water to beneficial use (*id.* at 173a). The district court awarded a reserved right of 394,631 acre-feet annually with an 1868 priority date (*id.* at 169a-172a) and a reserved right totalling 84,800 acre-feet with varying priority dates (*id.* at 172a-182a). In addition, the district court initially adopted that part of the special master's recommendation that would condition the use of the portion of the 1868 reserved water right awarded with respect to the future lands upon the provision of storage facilities sufficient to provide replacement water to junior non-Indian water users (*id.* at 234a-237a, 267a). Upon reconsideration, however, the court held that the water right could be exercised in the absence of any storage facilities to provide replacement water (*id.* at 194a-198a, 200a-201a).

2. The Wyoming Supreme Court affirmed most of the rulings of the district court (Pet. App. 1a-119a). It found, however, that the district court had erred in adopting the special master's recommendation of a ten percent reduction in the Indians' "future projects" land base to provide a margin of error (*id.* at 56a-58a). The court also ruled that the non-Indian appellants who acquired lands from Indian allottees must be awarded a reserved water right having an 1868 priority date for any of those lands that they can show are practically irrigable and either were irrigated by their Indian predecessors or were put under irrigation within a reasonable time after the date upon which they passed from Indian ownership (*id.* at 75a). Finally, the

court agreed with the special master's finding of an 1868 priority date for the reserved water rights claimed for allotted lands that had passed into non-Indian ownership and that had subsequently been reacquired by the Tribes. Accordingly, the Wyoming Supreme Court reversed the district court's holding of a later priority date for such lands (*ibid.*).

ARGUMENT

The State of Wyoming initiated this action to obtain a quantification of the Indian Tribes' water rights in the Big Horn Basin. Now, after a decade of litigation, including review by that State's highest Court, Wyoming has obtained what it sought—a definitive resolution of the Tribes' entitlement. Here, as is usually the case in complex general stream adjudications, none of the parties has obtained everything that it sought. But the Wyoming Supreme Court's decision is fundamentally fair, and the particular portions of the opinion below that petitioner and the non-Indian cross-petitioners now challenge are correct and do not conflict with any decision of this Court. To the contrary, they are consistent with this Court's decisions concerning water rights claimed on behalf of Indian reservations. Nor has the Wyoming Supreme Court articulated legal principles in this case that conflict with those followed by other appellate courts in similar cases. Accordingly, the petition for a writ of certiorari—and a fortiori the Indian and non-Indian cross-petitions—should be denied.

1. This Court held in *Winters* v. *United States*, 207 U.S. 564 (1908), that when the United States reserves lands on behalf of an Indian tribe, the United States at the same time also impliedly reserves for the use of the Indians such previously unappropriated waters as are needed to fulfill the purposes of the reservation. As the Court has since explained: "*Winters* concluded that the Government, when it

created [the] Indian reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." *Arizona* v. *California,* 373 U.S. 546, 600 (1963) (*Arizona I*). These *Winters* reserved water rights vested "as of the time the Indian Reservations were created." *Arizona I,* 373 U.S. at 600.

The language of the 1868 Treaty unambiguously indicates that one of the purposes of that treaty was to promote the establishment of agriculture on the Wind River Reservation. Furthermore, it is undisputed that the reserved lands require irrigation in order to produce crops (Pet. App. 26a). Thus, the special master, the district court, and the Wyoming Supreme Court all found, in accordance with the *Winters* doctrine, that the 1868 Treaty was intended to reserve water to carry out the agricultural purposes of the Reservation (*id.* at 26a-31a, 210a-222a, 431a-446a). Petitioner does not contend that the language of the Treaty itself or any documents or circumstances contemporaneous with its execution and ratification suggest a contrary result.[11] Rather, petitioner asserts (Pet. 12-18) that the "water proviso" to the 1905 Act somehow precludes the "judicial creation" of an implied reserved water right for the Reservation (Pet. 12), or, alternatively, that any reserved water rights created by the 1868 Treaty were subsequently extinguished by the water proviso to the 1905 Act.

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[11] Petitioner does suggest that the *Winters* doctrine has been undermined by *United States* v. *New Mexico,* 438 U.S. 696 (1978). Petitioner relies on a passage from that opinion that states (*id.* at 700):

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.

Petitioner, taking the words "entirely defeated" out of their context, maintains (Pet. 15-16) that the agricultural purposes of the Wind

The Wyoming Supreme Court properly rejected these contentions (Pet. App. 28a-32a). The 1905 Act does not, of course, shed any direct light on the intent of the parties to the 1868 Treaty. And even if that legislation provided a basis for inferring the 1905 Congress's view of the 1868 Treaty, such inferences would carry limited weight. It is "well settled" that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Russello* v. *United States,* 464 U.S. 16, 26 (1983) (quoting *United States* v. *Price,* 361 U.S. 304, 313 (1960)).

The 1905 Act, in any event, provides no reasonable basis for inferring the 1905 Congress's views on whether the 1868 Treaty created a reserved water right. The water proviso, which appears in Article III of the 1905 Act (Pet. App. 778a-779a), merely states that the remaining balance of an $85,000 sum to be obtained from the sale of certain Indian lands shall, following a per capita distribution of $50 per Indian, "become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights

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River Indian Reservation would not have been "entirely defeated" without a federal reserved water right because the Indians could have obtained water rights to a portion of their lands by securing the rights under state law. The possible availability of a state-law water right for some lands, however, is not an appropriate basis for rejecting a federal reserved right. Rather, as the extract from *New Mexico* quoted above clearly indicates, the appropriate test focuses upon whether water is needed in the physical sense to attain the purposes of the reservation. If so, then the courts will find an implied federal reserved water right effective as of the date the reservation was established. *Cappaert* v. *United States,* 426 U.S. 128, 138-139, 145 (1976). In this case, that date is 1868, long before Wyoming was admitted to the Union and therefore long before water rights could have been acquired pursuant to state law.

from said State for the irrigation of such lands as shall remain the property of said Indians * * * " (33 Stat. 1017). This proviso provides no concrete basis for inferring a congressional understanding that the 1868 Treaty—despite its explicit contemplation of agricultural development—failed to reserve the water necessary for that development. The proviso indicates, *at most,* some doubt whether—or to what extent—such reserved water rights existed. The 1905 Act, of course, predated this Court's 1908 *Winters* decision. Thus, the contours of the federal reserved rights doctrine, and the quantities of water that might be claimed under that doctrine, were then unresolved. Congress, responding to this uncertain state of the law, presumably elected to assist the Tribes in securing water rights in order to ensure that the Tribes would receive sufficient water for their land even if federal law did not already secure the necessary water rights. Petitioner's further inference that Congress's actions should be taken as an affirmative denial by Congress of the existence of a reserved water right is unwarranted.[12]

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[12] Petitioner is mistaken in suggesting (Pet. 12-13, 17) that Congress's rejection of proposals that would have expressly created a reserved right for the Wind River Reservation demonstrate that Congress wished to deny the Tribes such rights. The proposal to amend the 1905 Act to give the Indians a grace period in which to secure their own permits for allotments on the ceded portion of the Reservation (see H.R. Rep. 3700, 58th Cong., 3d Sess. 7-9 (1905)) does not indicate a congressional belief that there never was any prior intent to reserve water for the Indians. This proposal was rejected because it was feared that the statutory grace period would delay settlement of the opened area. See S. Rep. 4263, 58th Cong., 3d Sess. 2 (1905). As for the 1914 proposal, it was not enacted because it was introduced as an amendment to an appropriations bill and was ruled out of order. See Pet. App. 31a. In either instance, Congress's inaction is entitled to little weight in interpreting the 1868 Treaty. See, *e.g., Red Line Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 n.11 (1969).

A fortiori, the water proviso of the 1905 Act cannot reasonably be read as impliedly terminating the reserved water rights conferred by the 1868 Treaty.[13] This Court has required that "Congress's intention to abrogate Indian treaty rights be clear and plain." *United States* v. *Dion,* 476 U.S. 734, 738 (1986). See also, *e.g., Solem* v. *Bartlett,* 465 U.S. 463, 472 (1984). Petitioner falls far short of meeting that standard. The water proviso of the 1905 Act, which was essentially an appropriations measure concerning the disposition of a part of the funds to be generated by the land sales contemplated in the 1904 Agreement, does not expressly or impliedly surrender any water rights for the unsold lands that the Tribes held prior to the enactment of that statute. Nor has petitioner advanced any legislative history or surrounding circumstances showing a clear congressional intent to diminish existing treaty water rights for lands remaining in Indian ownership.[14] Indeed, Article X of the 1904 Agreement stated that nothing in that Agreement would deprive the Indians "of any benefits to which they are entitled under existing treaties or agree-

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[13] We address here petitioner's argument (Pet. 15-18) that the water proviso terminated all of the 1868 Treaty reserved water rights, without distinction as to the lands made subject to disposition under that Act and the lands of the "diminished" Reservation. We deal below with petitioner's separate argument (Pet. 26-28) concerning the lands that were made subject to sale under the 1905 Act but that never passed into non-Indian ownership and were later restored to the Indians.

[14] Petitioner incorrectly asserts (Pet. 17) that "the Wyoming Supreme Court failed even to address the fact that Congress carefully considered and refused to enact a limited reserved water right for the Wind River Indian Reservation * * *." The Wyoming Supreme Court considered (Pet. App. 29a-31a) these congressional inactions (see n.12, *supra*) and determined that they do not reflect any intent concerning any water rights that were created by the 1868 Treaty. Consequently, the court concluded, those inactions failed to demonstrate that the 1905 Act terminated the Tribes' treaty water rights (Pet. App. 31a).

ments, not inconsistent with the provisions of this agreement" (Pet. App. 774a). Petitioner would read the 1904 Agreement as effecting a termination of all of the Tribes' treaty water rights, including those for lands that were not subject to disposition under the Agreement and for which no compensation whatsoever was to be provided. This Court should decline petitioner's invitation to construe the water proviso as a "backhanded way of abrogating the [treaty] rights of these Indians." *Menominee Tribe* v. *United States,* 391 U.S. 404, 412 (1968).[15]

2. Petitioner alternatively maintains (Pet. 26-28) that the Wyoming Supreme Court erred by confirming an 1868 priority date for the reserved water rights respecting lands that, although made subject to disposition under the 1905 Act, were never sold and were later restored to the Indians. Petitioner asserts that the 1904 Agreement effected an immediate relinquishment of the Indians' reserved water rights for all of those lands. The Wyoming Supreme Court correctly rejected that contention.

Article I of the 1904 Agreement provided that the Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest" in the subject lands (33 Stat. 1016). The ceded lands were to be disposed of "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash," and the United States

[15] If the parties to the 1904 Agreement had intended to effect a termination of the Indians' water rights, they were well aware of how to draft a provision reflecting such intent. The negotiator on behalf of the United States was the same Agent James McLaughlin who had negotiated the earlier "Thermopolis Purchase," concluded in 1897, by which the Indians had ceded approximately 55,000 acres of the Wind River Reservation to the United States. Unlike the 1904 Agreement, however, the Thermopolis Purchase Agreement provided not only for a cession of the subject lands, but also for cession of "the water rights appertaining thereunto * * * " (Pet. App. 410a). Those water rights, of course, could only have been federal reserved water rights.

agreed to pay to the Indians the proceeds derived from the sales of the lands (art. II, 33 Stat. 1016-1017). Article IX provided, however, that the United States did not guarantee to find purchasers for the lands but, rather, agreed to "act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided" (33 Stat. 1018).

Statutes ratifying agreements with Indians are to be construed in favor of the Indians. *Antoine* v. *Washington,* 420 U.S. 194, 199 (1975). Notably, the 1904 Agreement did not state, as did various other turn-of-the-century surplus lands acts, that the subject lands were being "conveyed" to the United States. See *Solem* v. *Bartlett,* 465 U.S. at 469 n.10. Rather, the United States was to hold the lands in trust for the Indians for the purpose of future sale. The Indians were not to receive a fixed amount in return for the lands; instead, they were to be compensated as the lands were sold. Indeed, the 1904 Agreement expressly declined to guarantee that purchasers for all of the lands would ever be found. Under these circumstances, the unsold lands were not restored to the public domain but, instead, always retained their status as Indian lands. See *Ash Sheep Co.* v. *United States,* 252 U.S. 159, 164-166 (1920); *United States* v. *Brindle,* 110 U.S. 688, 693 (1884). See also *Solem* v. *Bartlett,* 465 U.S. at 473; *Ute Indian Tribe* v. *State of Utah,* 773 F.2d 1087, 1090 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). Because the Indians would receive no compensation for any given parcel as long as that tract remained unsold, and because there was no assurance that the subject lands would ever be sold, the 1905 Act can be read in the manner petitioner suggests only by assuming an implied intent to effect an immediate, uncompensated termination of treaty water rights for lands that still retained their Indian status and

that might retain that status indefinitely. Such an assumption would be contrary to the rule disfavoring the construction of statutes ratifying agreements with the Indians to their prejudice. It would be illogical as well. The unsold lands themselves never lost their status as lands reserved for the benefit of the Indians, and, accordingly, they continued to have a federal reserved water right as an inherent attribute of that status.[16]

3. This Court held in *Arizona I* that when Congress establishes an Indian reservation, the measure of water reserved for agricultural purposes is the amount sufficient "to irrigate all the practicably irrigable acreage on the reservation[ ]" (373 U.S. at 600-601). The Wyoming Supreme Court expressly applied that standard to quantify the amount of water reserved for the Wind River Indian Reservation (Pet. App. 47a). Petitioner now requests (Pet. 18-26) this Court to reconsider the practicably irrigable acreage (PIA) standard. That request should be denied.

Petitioner, after a decade of litigation, asserts that the PIA standard should be abandoned and the quantification process should begin anew using some other standard that would be determined by reference to the Indians' reasonable needs. This Court, however, expressly rejected peti-

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[16] Petitioner relies (Pet. 28) on *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), which concerned the question whether a reservation had been disestablished for purposes of determining governmental jurisdiction over lands within the area in question. By contrast, the issue presented here is not whether the 1905 Act diminished the exterior boundaries of the Wind River Reservation for jurisdictional purposes, but rather a distinct question of property rights: whether that statute effected an immediate, implied termination of the Indians' reserved water rights for such lands. As the Indians' beneficial ownership of those lands continued up to the time of their sale, the Tribes' reserved water rights – which were one of the incidents of their beneficial ownership – likewise remained in effect pending disposition and continued uninterrupted for those lands that were never sold.

tioner's substitute methodology in *Arizona I*, stating (373 U.S. at 601):

> How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

That reasoning is equally compelling here.[17]

Petitioner asserts that the continuing validity of the PIA standard has been called into question by this Court's subsequent opinions in such cases as *United States* v. *New Mexico*, 438 U.S. 696 (1978), and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*Fishing Vessel*). Similarly, the non-Indian cross-petitioners contend (88-553 Cross-Pet. 10-18) that the *New Mexico* decision created an "equitable device" (*id.* at 17), whereby a court must consider junior

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[17] Petitioner attempts to distinguish *Arizona I* on the ground (Pet. 19, 20, 23, n.25) that the reservations in question there had not been established for the use of any particular tribes specifically identified when those reservations were created. Nothing in this Court's *Arizona I* opinion, however, attributes any significance to that circumstance. The Court rejected a "future needs" standard in favor of the PIA standard because "[h]ow many Indians there will be and what their future needs will be can only be guessed" (373 U.S. at 601). The statement remains accurate even when only one Indian tribe is being considered. But even if petitioner's suggestion were meritorious as a matter of law, it would be unavailing here. Article II of the 1868 Treaty stated that the Wind River Indian Reservation was set aside for the use of the Shoshone and Bannock Tribes "and for such other friendly tribes or individual Indians as from to time they may be willing, with the consent of the United States, to admit amongst them." 15 Stat. 674. Hence, the 1868 Treaty contemplated the possible settlement of additional, unspecified tribes on the Reservation. Subsequently, the Arapaho Tribe was settled upon the Wind River Indian Reservation without the consent of the Shoshone Tribe. See page 4, *supra*.

non-Indian uses of the common water supply and, depending upon the particular facts, limit the exercise of the Indians' senior water rights in order "to protect [junior] state water users *after* the facts and law have been correctly applied" (Pet. App. 17a (emphasis in original)).

This Court has previously declined to reconsider the PIA standard in light of *New Mexico* and *Fishing Vessel*. *Arizona* v. *California*, 460 U.S. 605, 625-626 (1983) (*Arizona II*). In any event, petitioner's and cross-petitioners' reliance upon *New Mexico* and *Fishing Vessel* is misplaced. The question considered by this Court in *New Mexico* concerned the purposes for which water is reserved when lands are set aside for a national forest, and *Fishing Vessel* involved the allocation of fisheries where the Indians hold a treaty right to fish "in common with all citizens of the Territory." 443 U.S. at 659. Neither case concerned Indian water rights or addressed the PIA standard.

Furthermore, *New Mexico* does not, as the non-Indian cross-petitioners contend, furnish an "equitable device" for limiting the exercise of a federal reserved right once it has been determined such a right exists. Rather, *New Mexico* concerned only the issue of what circumstances are sufficient to give rise to a federal reserved water right in the first place. This Court stated (438 U.S. at 702):

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would ac-

> quire water in the same manner as any other public or private appropriator.

The *New Mexico* decision does not announce any equitable limitations on the recognition of a federal reserved water right. The decision simply holds that *implication* of a federally reserved water right to fulfill a reservation's secondary purposes would be inconsistent with Congress's policy of deferring to state water law. Indeed, this Court has expressly declined to adopt an "equitable balancing" approach in cases involving federal reserved water rights. The State of Nevada contended in *Cappaert* v. *United States, supra,* that this Court's decisions involving federal reserved water rights established "an equitable doctrine calling for a balancing of competing interests" (426 U.S. at 138). This Court, however, rejected that contention, noting that "an examination of those cases shows they do not analyze the doctrine in terms of a balancing test" (*ibid.*).[18] Cross-petitioners' contention here that the exercise of a federal reserved water right must be limited so as "equitably" to accommodate the demands of competing junior water users is indistinguishable in principle from the equitable balancing argument that this Court rejected in *Cappaert.*[19]

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[18] This Court further stated (426 U.S. at 139 n.4):

> Nevada is asking, in effect, that the Court overrule *Arizona* v. *California,* 373 U.S. 546 (1963), and *United States* v. *District Court for Eagle County,* 401 U.S. 520 (1971), to the extent that they hold that the implied-reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the "competing equities." * * * However, since balancing the equities is not the test, those cases need not be disturbed.

[19] Moreover, the Wyoming Supreme Court demonstrated a "sensitivity" (88-553 Cross-Pet. 13) to the interests of other water users, stating (Pet. App. 72a):

> In the case at bar, the purpose of the reservation for which water is reserved is narrow—agricultural only. The right was

In sum, petitioner and the non-Indian cross-petitioners have shown no adequate reason for now reconsidering the PIA standard.[20] As this Court observed in *Arizona I,* the PIA standard is particularly well suited to quantification of the reserved water rights for the agricultural purposes of Indian reservations. It offers a comparatively objective means of quantifying such rights, whereas any standard based upon "foreseeable needs" would necessarily involve a high measure of subjective judgment. Here, as in *Arizona II,* reconsideration of the PIA standard would open a "Pandora's Box" (460 U.S. at 625) and inject grave uncertainty into Indian water rights litigation.[21]

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quantified based on PIA—the master and the [district] court rejecting some 50,000 acres originally claimed by the United States and the Tribes. The Indians' claim was further reduced by requiring an efficiency increase in historic lands. All of this evidences a sufficient sensitivity to the water needs of other water users.

[20] Petitioner maintains (Pet. 23-26) that the Wyoming Supreme Court's use of the PIA standard conflicts with the decisions in *United States* v. *Walker River Irr. Dist.,* 104 F.2d 334, 339-340 (9th Cir. 1939), in which the court applied a "needs" standard, and *United States* v. *Ahtanum Irrigation District,* 236 F.2d 321, 337 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), in which the court found an implied reservation of such waters as were "required to provide for the reasonable needs of the Indians * * *." Both of those Ninth Circuit decisions, however, preceded this Court's decision in *Arizona I.* Thus, to the extent that they deviate from the PIA standard, they have no continuing precedential value, and in fact the Ninth Circuit has applied the PIA standard since *Arizona I* was decided. See, *e.g., United States* v. *Adair,* 723 F.2d 1394, 1415-1416 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).

[21] Petitioner's contention (Pet. 23-26) that the application of the PIA standard in this case resulted in a grossly excessive award is meritless. The Tribes relinquished their claims to vast aboriginal lands in exchange for the Wind River Reservation. The 1868 Treaty that effected this exchange recognized that the Tribes faced substantial cultural obstacles in developing an agricultural economy and that the

4. The non-Indian cross-petitioners contend (88-553 Cross-Pet. 19-22) that the Wyoming courts were obligated to use the discount rate established by the Water Resources Council (WRC) pursuant to Section 80(a) of the Water Resources Development Act of 1974 (WRDA), 42 U.S.C. 1962d-17(a), in considering whether lands on the Reservation can be feasibly irrigated in the future.

The choice of an appropriate discount rate is one step in determining whether acreage is "susceptible to sustained irrigation at reasonable costs" (Pet. App. 47a). The Wyoming Supreme Court correctly held that the special master's choice of a 4% discount was consistent with the expert testimony on the subject (Pet. App. 53a-54a). It is clear from the WRDA's plain terms that the Wyoming courts were not required as a matter of law to disregard their own assessment of the evidence and instead to employ the WRC discount-rate formula in quantifying Indian water rights. Section 80(a) states that the interest-rate formula established pursuant to that provision is to be

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Tribes' conversion from a nomadic to an agrarian existence would take time. Petitioner's contention that the Tribes should now be restricted to their "historic" water usage—and prevented from realizing further development of their practicably irrigable lands—is neither consistent with the Treaty nor fair. Indeed, given the special master's finding that "[t]he history of the Reservation consistently shows a level of unemployment far in excess of the rest of Wyoming" (Pet. App. 569a), it would appear that the Tribes have a compelling need to develop the agricultural potential of the Reservation. Thus, even if petitioner were correct that a court should attempt to calculate a reserved water right on the basis of its assessment of the Indians' "needs"—unanchored in any determination of the amount of irrigable land that Congress set aside for their benefit—there is no reason to believe that the quantification of the reserved water right in this case would be different. This case accordingly would not present a suitable occasion to revisit the PIA issue even if the Court were otherwise disposed to do so.

used "in plan formulation for discounting future benefits and computing costs by Federal officers, employees, departments, agencies, and instrumentalities in the preparation of comprehensive regional or river basin plans and the formulation and evaluation of Federal water and related land resources projects" (42 U.S.C. 1962d-17(a)). The WRDA requires federal agencies to use the WRC discount rate when making their feasibility studies concerning federal water-related projects. Such federal feasibility studies are specialized undertakings that often include a wide variety of public costs and benefits, such as flood control, effects on navigation, fish and wildlife, indirect economic benefits, and the like. They therefore may differ widely from other types of feasibility determinations, such as the one conducted here concerning the Tribes' future lands. The WRC interest rate was adopted for federal water project cost-benefit analysis only and is not necessarily appropriate for other purposes.[22]

5. Petitioner and the non-Indian cross-petitioners also object (Pet. 28-29; 88-553 Cross-Pet. 22-24) to the Wyoming Supreme Court's resolution of issues concerning the recognition of water rights when Indian lands pass into non-Indian ownership, as well as the recognition of water rights for such lands when they are reacquired by the Tribes. The Wyoming Supreme Court discussed these issues in a relatively brief portion (Pet. App. 72a-75a) of

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[22] The non-Indian cross-petitioners are mistaken in urging (88-553 Cross-Pet. 22 n.27) that the Wyoming Supreme Court's decision conflicts with the Tenth Circuit's decision in *Johnston* v. *Davis*, 698 F.2d 1088 (1983). *Johnston* holds only that a federal agency may use the WRC discount rate when preparing an environmental impact statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* It yields no suggestion that a state court must use the WRC discount rate when quantifying an Indian tribe's reserved water rights.

its lengthy opinion, and, contrary to the contention of petitioner and the non-Indian cross-petitioners, it did not articulate any principles of law that conflict with those expressed by the Ninth Circuit in *Colville Confederated Tribes* v. *Walton,* 647 F.2d 42, cert. denied, 454 U.S. 1092 (1981), and *United States* v. *Anderson,* 736 F.2d 1358 (1984). These issues therefore do not warrant review.

In *Walton,* the Ninth Circuit held that the non-Indian successor to an allottee takes title to the allottee's proportionate share of the reserved right, provided that the allottee had put the water to use or that the non-Indian purchaser does so within a reasonable time (647 F.2d at 51). Any such water right, moreover, must be maintained by continued use and not lost by non-use (*ibid.*). The Wyoming Supreme Court discussed *Walton,* with approval, in that portion of its opinion dealing with the water rights of the individual non-Indian appellants who are successors to Indian allottees (Pet. App. 72a-75a), stating that "[o]n remand, appellants [non-Indian successors] must be awarded a reserved water right with an 1868 priority date for the PIA they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter" (Pet. App. 75a). The court, however, did not expressly state, as did the Ninth Circuit in *Walton,* that any such rights must be continually maintained in order to protect them from loss through non-use. Unlike the non-Indian cross-petitioners (88-553 Cross-Pet. 24), however, we do not read the Wyoming Supreme Court's failure expressly to spell out the consequences of non-use as creating a conflict with *Walton.* The Wyoming Supreme Court did not state that *Walton* rights held by non-Indians cannot be lost through non-use. Rather, the court simply failed to address that subject one way or the other, perhaps because further proceedings are contemplated on

the rights of non-Indians who claim *Walton* rights (Pet. App. 75a). Hence, the opinion of the Wyoming Supreme Court cannot reasonably be read as adopting the principle that *Walton* rights, once established, may not be lost through non-use.

In *Anderson,* the Ninth Circuit further held that if a tribe reacquires formerly allotted lands, the "*Winters* rights appurtenant to allotted lands conveyed to a non-Indian purchaser will pass with title upon reacquisition by the Tribe and will retain their original priority date" (736 F.2d at 1362). The Wyoming Supreme Court's opinion in this case contains nothing indicating that it disagreed with the Ninth Circuit's discussion in *Anderson* of the appropriate principles to be applied when an Indian tribe reacquires allotted lands. The Wyoming Supreme Court simply stated, after discussing the rights of the *non*-Indian purchasers of allotted lands (Pet. App. 72a-75a), that when such lands are reacquired by the Tribe, there "is no reason then to deny the same priority to an Indian or tribal purchaser" (Pet. App. 75a). Petitioner objects (Pet. 29) that the court did not expressly state that there must be a showing that the reserved right was not lost through non-use by the intervening non-Indian owner. However, the court made clear that the tribal purchaser succeeds to the "same priority" as a non-Indian purchaser, and it therefore presumably would agree with the position of *Anderson*—and of petitioner herein—that the Tribe does not obtain a reserved right to reacquired lands if the reserved right has already been lost by the intervening non-Indian owner. The court's failure to address this issue explicitly may be due to petitioner's failure to make a showing of such a loss by non-use with respect to particular parcels of reacquired allotted lands.

Finally, the Ninth Circuit held in *Anderson* that, as to former Indian lands that were disposed of to non-Indians under a surplus lands act (rather than by Indian allottees)

and were later reacquired on behalf of the Indians, the tribe obtains a water right with a priority date as of the time the non-Indian obtained a water right, if any (736 F.2d at 1363). If no such state-law water right existed upon the date of reacquisition, then the tribe obtains a reserved water right with a priority date as of the date of reacquisition (*ibid.*). In this case, the Wyoming Supreme Court did not separately address the existence of water rights for those reacquired lands that originally were disposed of to non-Indians under the 1905 Act, rather than by individual allottees. The court's silence may be attributable to the fact that petitioner itself failed to urge that those lands should be treated differently and to lay a proper foundation for such an argument in the course of this litigation. Indeed, although the United States brought this aspect of *Anderson* to the attention of the Wyoming Supreme Court, petitioner urged that Court to disregard *Anderson* and to deny a reserved water right to *all* reacquired lands, whether they were originally alienated by individual allottees or pursuant to the 1905 Act. See generally Brief of Appellee State of Wyoming in Response to the Appellant's Brief of the United States and Tribes (Type 1 Claims), at 151-185. Against this background, the Wyoming Supreme Court's failure to address the 1905-Act lands separately is understandable.[23] In any event, the Wyoming Supreme Court's *silence* with respect to lands disposed of under a surplus lands act does not create a conflict with the Ninth Circuit's discussion of that subject in *Anderson*.[24]

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[23] Petitioner did rely on this distinction in its brief in support of its petition for rehearing (at 46-50) in the Wyoming Supreme Court, but the court denied that petition without comment (Pet. App. 122a). The state court's failure to address that issue at petitioner's behest for the first time on rehearing does not raise an issue for this Court's consideration.

[24] The district court, which—contrary to the Ninth Circuit's holdings in *Walton* and *Anderson*—ruled (Pet. App. 224a-225a) that

6. The non-Indian cross-petitioners also assert (88-553 Cross-Pet. 24-30) that the United States should be equitably estopped from asserting reserved water rights on behalf of the Tribes because the United States induced non-Indians to settle in the area knowing that the land could be profitably farmed only by irrigation, which, in turn, necessitated secure water supplies. The Wyoming Supreme Court correctly rejected that argument (Pet. App. 22a-23a).

The United States would not be estopped here even under the rules generally applicable in cases involving wholly private parties. Equitable estoppel requires, as an indispensable element, a misrepresentation by the party against whom the estoppel is invoked. See *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). There is no showing here that the United States ever represented that there would be sufficient water to irrigate lands patented to non-Indian settlers under the general public land laws. It is well established that a federal patent does not carry with it any right to the use of water; rather, an entryman must look elsewhere to perfect a water right. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 158-164

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an Indian allottee's non-Indian successor could not acquire a share of the reserved water right, did identify parcels that had passed into non-Indian ownership and that were subsequently reacquired on behalf of the Tribes (Pet. App. 173a-182a). The district court, however, did not differentiate between former allotted lands and former surplus-land-act lands. Notably, however, even under the district court's holding, the great majority of the water rights associated with the reacquired lands would be awarded early priority dates, typically before 1920. Petitioner has not asserted that the difference between such priority dates, as awarded by the district court, and the 1868 priority date awarded by the Wyoming Supreme Court, will, as a practical matter, have significant adverse effects upon water rights claimed by other parties.

(1935). Hence, the United States does not, by making lands available under the public land laws, represent that sufficient water will be available to make the lands productive. Nor is there any showing here that the United States ever represented that it would not claim reserved water rights on behalf of the Tribes. In fact, the district court specifically held that there is "no evidence in the record to support a finding of affirmative misconduct by the Federal Government" (June 8, 1984, Order at 13). The lack of any misrepresentation concerning water rights is, alone, fatal to any equitable estoppel argument.

7. The Shoshone Tribe and the Northern Arapaho Tribe of the Wind River Indian Reservation have filed a conditional cross-petition requesting that, if the Court grants Wyoming's petition for a writ of certiorari, the Court also address six additional issues that the Wyoming Supreme Court decided against the Tribes. See 88-492 Cross-Pet. i-ii. In our view, this Court should not undertake review of Wyoming's claims of error in this complex water rights dispute without also considering those issues raised by the Tribes that are closely related. We therefore submit that if the Court grants Wyoming's petition, the Court should have before it the Tribes' issues as well. Cf. *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

CONCLUSION

The petition and cross-petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 88-309 and 88-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF WYOMING,
Petitioner,
v.
UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Respondents.

CITY OF RIVERTON, WYOMING, *et al.*,
Cross-Petitioners,
v.
UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Cross-Respondents.

On Petition and Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming

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JOINT MEMORANDUM OF STATE OF WYOMING AND CITY OF RIVERTON, ET AL., IN REPLY TO OPPOSITION BRIEFS OF THE SHOSHONE AND ARAPAHO TRIBES AND THE UNITED STATES OF AMERICA

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In this reply memorandum, the petitioner, State of Wyoming, Case No. 88-309, and the cross-petitioner, City of Riverton, *et al.*,[1] Case No. 88-553, address certain aspects of the opposition briefs submitted herein by the respondent United States and cross-petitioner Tribes.[2] In addition to raising new arguments concerning the allocation of the burden of proof, the United States and Tribes rely on evidence which is not in the record below and ignore or misstate that record.

I. THE TRIBES AND THE UNITED STATES RAISE NEW ARGUMENTS CONCERNING THE EXISTENCE OF A FEDERAL RESERVED WATER RIGHT IN LIGHT OF CONGRESSIONAL DEFERENCE TO STATE LAW FOR THE ACQUISITION OF WATER RIGHTS FOR THE WIND RIVER INDIAN RESERVATION

The United States' and Tribes' response to Wyoming's Petition as it concerns the intent issue seems to forget that the issue before this Court is whether or not to grant *certiorari* review. Indeed, the very number of substantive arguments set forth by the United States and Tribes on the issue, which go far beyond *certiorari* practice and Wyoming's Petition, strongly suggests that a decision of this Court is needed to resolve those issues on the merits.

a. *Creation of the Federal Reserved Water Right.* Both the United States and the Tribes argue that it is not this, nor any court's, business to look past the circumstances surrounding establishment of a federal reservation to determine whether a federal reserved water

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[1] The cross-petitioners in Case No. 88-553 are as set forth in note 1 of the cross-petition therein. They are collectively referred to herein as "Riverton."

[2] Brief in Opposition for Respondents and Cross-Respondents Shoshone and Northern Arapaho Tribes, Nos. 88-309 and 88-553, November 21, 1988, hereinafter "Tribes' Opposition Brief" and Brief for the United States in Opposition, Nos. 88-309, 88-492, and 88-553, November, 1988, hereinafter "United States' Opposition Brief."

right was created to serve its purpose. United States' Opposition Brief, at 9-11; Tribes' Opposition Brief, at 16-18. Each argues that it is sufficient to imply the existence of a reserved water right if the Reservation needs water to achieve its purposes, without further examination of how Congress may have *intended* for water to be supplied. Such "bootstrapping" is, however, precluded by the decisions of this Court which demand a full examination of the intent of Congress to determine "what quantity of water, if any," it may impliedly have reserved. *United States v. New Mexico*, 438 U.S. 696, 698 (1978). *See also Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963). Thus, the issue before this Court is not only whether water would be necessary to achieve the Reservation's purpose, but whether Congress expressly intended such water to be secured under the law of Wyoming.

b. *Chronological Perspective.* The Tribes suggest that relying upon the 1905 Act to discern Congress' intent regarding the water rights of the Reservation, lacks "chronological perspective." Tribes' Opposition Brief, at 19. Even leaving aside comment on the strange position that the one statute which deals specifically with acquiring water rights for the Reservation is irrelevant to judge how water rights for the Reservation were to be obtained, the Tribes' argument lacks merit. The use of later Congressional actions to determine prior Congressional intent in the reserved right context has been relied upon by this Court as recently as *United States v. New Mexico*, 438 U.S. at 702-703. The same approach formed one basis of the Ninth Circuit Court of Appeals' analysis in *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921).

In any event, it is the Tribes, in seeking to preclude a discussion of the intent issue, who disregard the historical facts regarding water use on the Reservation. As early as 1876, the Wyoming territorial legislature had codified the right of riparian land owners to use adjoin-

ing waters.[3] Only later, near the turn of the century, after the appropriation doctrine had been established in Wyoming, was desperation over the need to protect the Tribes' water rights from competing appropriations voiced by federal officials.[4] The 1905 Act was Congress' direct response to this concern to assure that the Tribes' water needs would not be imperiled by virtue of competing non-Indian appropriations. It is curious, speaking in 1988, that the Tribes and the United States allege that actions taking place in 1905 lack "chronological perspective" to a complete understanding of this case.

c. *The Purpose of "Securing" Water Rights.* Without any support in the record, both the Tribes and the United States suggest that the purpose of the 1905 Act was merely to "secure" Wyoming water rights to be obtained for the Reservation in the event that reserved water rights did not exist.[5] This rationalization is without foundation. First, the 1905 Act does not, as the Tribes and United States suggest, speak of "securing" water rights in the abstract. The plain language of Article 3 states that the funds devoted to water right acquisition "shall at once become available and shall be devoted to survey,

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[3] Wyo. Comp. Laws, Ch. 65, § 1 (1876). The United States ignores this law in arguing that no means of establishing Tribal water rights existed at the time the Reservation was created. United States' Opposition Brief, note 11.

[4] *See*, for example, Wyo. Exh. WRIR I&P 40, 43, and 49. The Tribes are incorrect when they suggest that a thorough review of the Reservation's history was made below. Like the Tribes, the lower courts ignored the evidence, dismissing it as "lacking perspective." Wyo. App. II, at 437a.

[5] Tribes' Opposition Brief, at 21; United States' Opposition Brief, at page 11. The Tribes cite the testimony of Dr. Iverson in support of their contention regarding the purpose of the 1905 Act. Tribes' Opposition Brief, at 20. Dr. Iverson testified, however, that it was not within the scope of his work to investigate water rights issues presented by the 1905 Act. Tr. at 119, 251-254, April 6, 1980.

platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming *in securing water rights from such state* for the irrigation of such lands as shall remain the property of the Indians. . ." (emphasis added). From the very words of the statute, it is apparent that "securing" water rights from Wyoming simply means "obtaining" such rights, nothing more. Second, the legislative history of the 1905 Act reveals that Congress rejected an attempt to create a limited reserved water right for the Reservation.[6] The United States argues that Congress rejected this proposal simply to avoid delay in the opening of the Reservation. United States' Opposition Brief, note 12. Can it logically be said that a Congress concerned about delaying the opening of the Reservation by the limited withdrawal of Reservation waters from appropriation would have agreed to the vast reserved water right now claimed by the United States and Tribes? Third, the contemporaneous administration of the 1905 Act reveals that permits to irrigate nearly 150,000 acres on the Reservation were obtained. There was no suggestion at any time prior to the 1905 Act, or between 1905 and 1908, the year of the *Winter's* announcement, that

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[6] The Tribes assert that Congress could not have meant to fulfill its treaty obligations to the Tribes by causing an expenditure of the Tribes' "own proceeds." Tribes' Opposition Brief, note 21. In fact, in the negotiations which resulted in the agreement which the 1905 Act confirmed, it was the *Tribal spokesman* who asked that as much money as possible be set aside to secure water rights for the Reservation. Wyo. Exh. WRIR I&P 8, at 19. Furthermore, the 1905 Act also earmarked an additional $150,000 of the sale proceeds to construct irrigation facilities, an additional $50,000 for the purchase of livestock, an additional $50,000 for a school fund, and all remaining sale proceeds to a general welfare fund. *See* Articles 4, 5, 6, and 7. In making the assertion they do, the Tribes also forget that Congress appropriated over $2,000,000 in the years after 1905 to construct irrigation facilities on the Reservation. Those appropriations were unrelated to the sale proceeds obtained under the 1905 Act.

water rights for the Reservation were to be obtained other than under Wyoming law. The Tribes and United States persist in reading *Winters* as somehow overturning the 1905 Act, rather than recognizing the Act as an express Congressional alternative to the implication of a reserved water right. Finally, the Tribes and United States conveniently ignore the fact that, by 1905, Congress had expressly created reserved water rights on behalf of the Fort Hall, Crow, and Mission Indian Reservations.[7] Within one year of the 1905 Act, Congress again created an express reserved water right, for the Yakima Reservation in Washington.[8] Congress was, indeed, adept at "securing" the federal reserved water rights of Indian reservations by express legislation in 1905. The 1905 Act reveals that it was equally adept at employing state law to the task.

d. *Gallon-for-Gallon Reduction.* It is also dangerously misleading to suggest, as have the Tribes, at Footnote 7 and the accompanying text of their opposition brief, that enforcement of the reserved water right on the Reservation will result in "virtually no water loss to non-Indian irrigators." The fact is that this summer, state water users were damaged by exercise of reserved water rights of an amount far less than the reserved water right awards for "historic" lands by the decree below. Those rights did *not* include the use of one drop of the approximately 210,000 acre-feet of water awarded for "future projects." As the master below found, absent storage, water for the future projects will come from the ditches and reservoirs of Wyoming users.[9]

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[7] *See*, respectively, Act of June 6, 1900, Article VIII, 31 Stat. 672; Act of April 27, 1904, Article V, 33 Stat. 352; Mission Indian Relief Act of 1891, 26 Stat. 712.

[8] Act of March 6, 1906, § 5, 34 Stat. 53.

[9] Wyo. App. H, pp. 629a, 630a, 688a-690a. These findings remain entirely undisturbed.

e. *The Decisions in United States v. Parkins*[10] *and United States v. Hampleman.*[11] Finally, the Tribes and the United States argue that the issue of whether a federal reserved water right exists on behalf of the Reservation has been settled by *United States v. Parkins* and *United States v. Hampleman.* The Wyoming Supreme Court, however, rejected the interpretations of the cases offered by the Tribes. This is unsurprising since *United States v. Parkins* was a lawsuit by the United States to enjoin Parkins from diverting on the Reservation to the detriment of the United States' *appropriative* water rights under Wyoming law. No reserved right was at issue. The United States District Court enjoined Parkins' diversions on four bases, only one of which addressed the topic of federal reserved water rights and which, in doing so, merely assumed that such existed on behalf of the Reservation. *United States v. Parkins*, 18 F.2d 642 at 643. For its part, the *Hampleman* decree does not even allude to the issue of reserved water rights for the Reservation.[12] It is a decision concerning regulatory jurisdiction only. In any event, if the United States is prepared to argue that these cases settle the issue of reserved water rights on the Reservation, they must also be bound, as a matter of *res judicata*, by the absence of any claim or decree in either recognizing reserved water rights for any purpose other than to serve the agricultural purpose of the Reservation.

II. THE TRIBES RELY ON EVIDENCE NOT IN THE RECORD CONCERNING THE RESERVATION'S "NEEDS" FOR WATER

The Tribes represent that the reserved water right is for water which "is desperately needed to improve the

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[10] 18 F.2d 642 (D. Wyo. 1926).

[11] Case No. 753 (D. Wyo. June 26, 1916).

[12] Wyo. Exh. WRIR I&P 34.

economy on the Reservation." [13] There is absolutely no evidence, let alone a finding by the trial court below, that this is true. The Tribes' argument seems to be that, as a matter of law, every Indian reservation has a desperate need for all the water which can be used for the irrigation of any practicably irrigable land on the reservation. Nevertheless, the Tribes point to no decision of this or any other court which so holds. Each decision relied upon by the Tribes is addressed to the specific fact situation confronted by the court rendering that decision. The Tribes fail to demonstrate that the instant fact situation is indistinguishable from those involved in the cited decisions.

III. THE TRIBES RAISE NEW ARGUMENTS CONCERNING THE ALLOCATION OF THE BURDEN OF PROOF WITH RESPECT TO THE APPROPRIATE STANDARD OF QUANTIFICATION OF THE RESERVED RIGHT AND THE PRIORITY DATE FOR REACQUIRED LANDS

The Tribes assert that the State of Wyoming failed to establish the amount of water which should have been awarded under the "minimal needs" or "moderate living" standards for the quantification of the reserved water right.[14] Similarly, the Tribes suggest that the State should have put on evidence as to whether reserved water rights on reacquired lands had "been lost through nonuse." [15] In both instances the Tribes fail to understand that evidence in support of the Tribes' claims must be adduced by the Tribes themselves or the United States.

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[13] Tribes' Opposition Brief, note 37.

[14] "[T]he State never proffered any evidence at all to support the assertion that the amount of reserved water quantified under the PIA standard exceeded the 'minimal needs' or 'moderate living' requirements of the Indians." Tribes' Opposition Brief, at note 37.

[15] *Id.*, at page 38.

Throughout the adjudication below, the State consistently asserted that "minimal needs" or "moderate living" was the appropriate standard for the quantification of the reserved water right. The Tribes now suggest that, having done so, the State was obliged to put on evidence in support of those rights.[16] Having elected to ignore the appropriate standard, the Tribes cannot now complain that no one else proved up their reserved water right. In the same vein, the Tribes seem far off the mark in arguing that someone else should have proved that their reserved water right had or had not been continuously used on reacquired lands.

IV. THE TRIBES IGNORE THE EVIDENCE OF RECORD WHICH CONCLUSIVELY DEMONSTRATES THAT THE SOURCE OF FUNDING FOR THEIR "FUTURE PROJECT" WILL BE FROM THE FEDERAL GOVERNMENT

The Tribes categorize as "sheer speculation" the argument by Riverton that future irrigation projects would be implemented "only by obtaining federal funds."[17] Perhaps the same could be said of the entirety of the Tribes' "future" claims which were supported by the testimony of the very same witness, called by the Tribes, who testified, "the source of the money is the Federal Government . . . ." Tr. at 5078. For the Tribes now to argue that the appropriate discount rate is other than that prescribed by federal statute is to turn a blind eye to their own evidence.

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[16] In fact, the State consistently asserted that the evidence of seventy-five years of intensive historic irrigation on the Reservation established the level of "minimal needs." Wyoming's Amended Proposed Master's Report, May 5, 1982, Vol. III, p. 1.

[17] Tribes' Opposition Brief, at page 43.

V. THE UNITED STATES MISINTERPRETS THE RECORD BELOW IN SUGGESTING THAT THE STATE DID NOT TIMELY RAISE THE *ANDERSON* ISSUES

The United States argues that the conflict concerning priority dates between the decisions of the Wyoming Supreme Court herein and that of the Ninth Circuit in *Anderson*,[18] was the result of the failure of the State to raise the issue below.[19] This misstatement is undoubtedly due to the Solicitor's understandable unfamiliarity with the extensive record. The State consistently asserted before the master,[20] the trial court [21] and the Wyoming Supreme Court [22] that the priority date for water rights associated with reacquired homesteaded lands should be no earlier than the date of reacquisition or the date established under state law.[23]

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[18] *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

[19] United States' Opposition Brief, at page 22.

[20] Wyoming's Amended Proposed Master's Report, May 5, 1982, Vol. V, pp. 166-67.

[21] Wyoming's Brief in Support of Motion for Action upon the Special Master's Report on Indian Reserved Rights Claims, March 18, 1983, p. 60, note 184.

[22] Brief of Appellant State of Wyoming (Type I Claims), December 2, 1985, pp. 132-133.

[23] Obviously, since *Anderson* was not decided until 1984, after the trial court decision, the Ninth Circuit's opinion was not cited by name except to the Wyoming Supreme Court.

CONCLUSION

In light of the inability of the Tribes and the United States to face the issues presented in the State's petition and Riverton's cross-petition without misstating the record below, the need for review of the decision below is indisputable.

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